

***Together with Case No. 382, American-Hawaiian Steam-
ship Co. v. Hull.**

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Sub Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 381

**Z. & F. ASSETS REALIZATION CORPORATION,
PETITIONER,**

vs.

**CORDELL HULL, SECRETARY OF STATE, AND
HENRY MORGENTHAU, SECRETARY OF THE
TREASURY; LEHIGH VALLEY RAILROAD COM-
PANY, INTERVENER**

No. 382

**AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
PETITIONER,**

vs.

**CORDELL HULL, SECRETARY OF STATE, AND
HENRY MORGENTHAU, SECRETARY OF THE
TREASURY; LEHIGH VALLEY RAILROAD COM-
PANY, INTERVENER**

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA**

PETITIONS FOR CERTIORARI FILED AUGUST 29, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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United States Court of Appeals for the District of Columbia

JANUARY TERM, 1940.

No. 7596

Z. & F. ASSETS REALIZATION CORPORATION, A
DELAWARE CORPORATION, PLAINTIFF-AP-
PELLANT.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
INTERVENER-PLAINTIFF-APPELLANT,

vs.

CORDELL HULL, SECRETARY OF STATE, AND
HENRY MORGENTHAU, SECRETARY OF
TREASURY, DEFENDANTS-APPELLEES,

LEHIGH VALLEY RAILROAD COMPANY, INTER-
VENER-DEFENDANT-APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1940.

United States Court of Appeals for the District of Columbia

a. District Court of the United States
For the District of Columbia

Civil Action No. 4598.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation, *Plaintiff*,

—against—

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of Treasury, *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1. Filed October 31, 1939

In the

District Court of the United States,

For the District of Columbia.

Civil Action No. 4598.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation, with an office and place of business at 100 Broadway, in the City, County and State of New York, *Plaintiff*,

—against—

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of Treasury, *Defendants*.

Complaint.

The plaintiff seeks an injunction and decree directing payment of money.

The plaintiff above named, by Hubert E. Rogers, John F. Condon, Jr. and Frank Roberson, its attorneys, on information and belief, alleges as follows:

1. That Z. & F. Assets Realization Corporation of 100 Broadway, City, County and State of New York, plaintiff, is a corporation organized under the laws of the State of Delaware and has been such since the 17th day of March, 1924.

2. That on or about August 10, 1922, an agreement was entered into between the United States and Germany for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded between the two governments on August 25, 1921.

3. A copy of said agreement is hereto annexed and marked Exhibit A.

4. That pursuant to said agreement a mixed arbitral tribunal was created consisting of, an American commissioner, a German commissioner and an umpire. That on October 16, 1930, the said Commission consisted of Roland W. Boyden, Umpire, Chandler P. Anderson, American Commissioner and Wilhelm Kisselbach, German Commissioner. That thereafter the said Umpire and the said American Commissioner died, and said German Commissioner resigned. That said Commission will hereafter be referred to as the Mixed Claims Commission.

5. That on or about the 24th day of March, 1932, Hon. Owen J. Roberts was appointed Umpire of said Commission and since that date has purported to act as such.

6. That on or about the 31st day of May, 1934, Victor C. Huecking was appointed German Commissioner and purported to act as such until the first day of March, 1939, when he resigned.

7. That on or about September 12, 1936, Christopher B. Garnett was appointed American Commissioner and that said Garnett has since that date purported to act as such Commissioner.

2 8. That Zimmermann & Forshay, a partnership consisting of Messrs. Leopold Zimmermann, Louis

J. Rees, Maryan H. Hanser, John S. Scully, Simon B. Blumenthal, Isaac Gutenstein and David Forshay duly filed claims with said Commission, and thereafter the said claims and all rights thereunder were duly transferred and assigned, by assignment dated the 10th day of April, 1924, to plaintiff, a corporation organized for the purpose of liquidation and distribution of the assets of the former firm of Zimmermann & Forshay, pursuant to order of the United States District Court for the Southern District of New York. That the said Commission thereupon duly granted five awards in favor of the said plaintiff, Z. & F. Assets Realization Corporation which with interest from certain dates to January 1, 1928 aggregate the sum of One million one hundred seventy-five thousand nine hundred eighteen and 78/100 (\$1,175,918.78) Dollars, docket Nos. 6997, 7023, 7948, 8199 and 8369, on which plaintiff has received on account the sum of Eight hundred sixty-four thousand forty-eight and 31/100 (\$864,048.31) Dollars, leaving a balance unpaid of Three hundred eleven thousand eight hundred seventy and 47/100 (\$311,870.47) Dollars, which with interest from January 1, 1928 to January 15, 1936 of Two hundred eighty-seven thousand five hundred three and 49/100 (\$287,503.49) Dollars, makes a total aggregate unpaid balance of Five hundred ninety-nine thousand three hundred seventy-three and 96/100 (\$599,373.96) Dollars.

9. That prior to December 31, 1931, numerous claimants, having previously filed claims with said Commission, were duly granted awards by the said Commission in an amount in excess of One hundred fifty million (\$150,000,000) Dollars, on which they have received various payments out of a fund provided therefor by an Act of Congress and more particularly referred to hereafter, leaving an unpaid balance in excess of Thirty-five million (\$35,000,000) Dollars on the principal amount of their claims, and approximately Twenty-eight million (\$28,000,000) Dollars in accrued interest.

10. That prior to the 16th day of October, 1930, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others, filed claims with the said Mixed Claims Commission, which claims were, on October 16, 1930, duly dismissed by said Commission. An application for a rehear-

ing upon said claims was denied on March 30, 1931, and likewise a second application for rehearing of said claims was denied on December 3, 1932. That the Governments of the United States and Germany were duly advised of said decisions.

11. That on May 4, 1933, there was filed with what purported to be the Mixed Claims Commission by said Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited and Bethlehem Steel Company, and others, another application for rehearing of the decision dismissing said claims.

12. That on June 3, 1936, the said alleged Commission handed down its decision whereby it decided that the application for rehearing under the petition of May 4, 1933, must be determined by a hearing separate and distinct from any argument on the merits of the controversy.

13. That in the month of January, 1939, argument was had before what purported to be the American Commissioner, the German Commissioner and the Umpire, purporting to act as such Mixed Claims Commission, which argument was attended by what purported to be the Agent for the United States Government, and the Agent for the German Government and which argument commenced on the 16th day of January, 1939, and continued until the 27th day of January, 1939, at which time decision was reserved by the body purporting to act as a Commission.

14. That thereafter the aforesaid alleged American Commissioner, the alleged German Commissioner and the alleged Umpire entered upon their deliberations on the single question whether fraud and collusion had been established sufficiently to justify a rehearing of said claims, which deliberations had not been concluded on the first day of March, 1939, on which date the aforesaid alleged German Commissioner resigned and took no further part in the deliberations of the aforesaid alleged Commission.

15. That thereafter, on or about the 7th day of June, 1939, the aforesaid alleged American Commissioner, by an alleged notice to the alleged German Agent purported to call a meeting of the aforesaid alleged Commission, to be held on the 15th day of June, 1939; that at said time there had been no commissioner appointed in the place and stead of said German Commissioner who had resigned.

16. That the aforesaid alleged American Commissioner had no authority to call said meeting.

17. That on the 15th day of June, 1939, the aforesaid alleged American Commissioner and the aforesaid alleged Umpire purported to hold a meeting of the said Commission in the absence of any alleged German Commissioner, and at said meeting, there was delivered and filed by the aforesaid alleged American Commissioner an alleged certificate purporting to be a certificate of disagreement and purporting to certify to the aforesaid alleged Umpire that there was a disagreement between the aforesaid alleged American Commissioner and the aforesaid alleged German Commissioner on material points before the aforesaid alleged Commission other than the one question, to wit, whether the application for rehearing should be granted, together with an opinion of the aforesaid alleged American Commissioner, in which opinion the aforesaid alleged American Commissioner stated that there had been a disagreement between the said aforesaid alleged German Commissioner and the aforesaid alleged American Commissioner prior to the resignation of aforesaid alleged German Commissioner; as to whether application for rehearing should be granted; and likewise, the aforesaid alleged American Commissioner, in said certificate, purported to certify that such disagreement existed; and in the said alleged certificate and opinion included therewith it was claimed by the aforesaid alleged American Commissioner that the aforesaid alleged Umpire was entitled to decide the alleged points of difference between the aforesaid alleged American Commissioner and the aforesaid alleged German Commissioner.

18. That Article VIII of the Rules of Procedure adopted by said Commission reads as follows:

“(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.”

19. That, although according to the aforesaid rule that certificates of disagreement should be signed by the two national commissioners, said certificate of alleged disagreement was certified to only by the aforesaid alleged American Commissioner and not certified to by the aforesaid alleged German Commissioner.

20. That, upon the filing of said certificate and the opinion of the aforesaid alleged American Commissioner at said hearing on June 15, 1939, the said alleged Umpire handed down his decision granting the said application for rehearing.

21. That prior to the 15th day of June, 1939, to wit, at some time in the year 1929, it was duly stipulated between the American and German Agents of the said Commission, with the approval of the Commission, to postpone any discussion of the question of the amount of damages sustained to aforesaid alleged claimants—both in respect to the issues of fact and the questions of law involved—until after the determination of the question of Germany's responsibility for acts complained of as a basis of Germany's liability; that pursuant to said stipulation and prior to and on the first day of March, 1939, at the time when the resignation of the alleged German Commissioner took place and down to and past the 15th day of June, 1939, and down to the commencement of this action there had been no proofs of the amount of damages sustained by the alleged claimants submitted to the Commission; that there has been no agreement arrived at by the American and German Agents as to the amount of damages sustained by said alleged claimants, nor has there been any decision by the two Commissioners and no certificate of disagreement on this question.

22. That thereupon the aforesaid alleged American Agent at said alleged hearing on June 15, 1939, and without any hearing on the merits having been had, made application that awards be granted to all the claimants who had made application for rehearing, namely, the said Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others.

23. That thereupon the aforesaid alleged Umpire notwithstanding the resignation of the German Commissioner on March 1, 1939, and notwithstanding that no new German Commissioner had then been appointed or was acting,

without the presence of any German Commissioner and without notice of any kind to the German Government or the German Agent, without any rehearing and without any submission to the German Agent, or to any German Commissioner, of any proofs on the amount of damages, either in respect of the issues of fact or the questions of law involved granted said motion; and thereafter the said Umpire signed and filed, with the concurrence of the American Commissioner documents purporting to be awards in favor of said claimants, to wit, the Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company,

5 Limited, Bethlehem Steel Company, and others; and upon information and belief that certain of said claimants were in whole or in part insured by insurance companies for the payment of some or all of the damages alleged to have been suffered by said claimants and said last mentioned claimants received from said insurance companies payment of part or of all of the damages so sustained; and by right of subrogation, the said insurance companies likewise filed a claim for the amount of the said payments of said damages paid as above stated to the claimants last above mentioned; that in many instances, said insurance companies were at all times and still are corporations whose stock was and is owned by non American nationals and therefore, in any event, not entitled to collect the claims respectively filed by them as such subrogees to the extent of such non American national ownership.

24. On information and belief, that the said alleged American Commissioner, without notice to any German Commissioner or German Agent and without the presence of any German Commissioner or the German Agent, conferred with the American Agent and Counsel as to the merits of the respective claims of the said claimants and the amount of the awards to be rendered in favor of the said claimants and thereupon, without right, power or authority, authorized the American Agent to determine the amount of the said awards, and thereupon the said alleged American Commissioner, without knowledge or consent of any German Commissioner or knowledge or consent of the German Agent, signed awards to the said claim-

ants for the amounts so fixed and assessed by the American Agent.

25. That the total of the aforesaid alleged awards so granted by the said Umpire, with the concurrence of the aforesaid American Commissioner, amounted with interest to a sum in excess of Twenty-five million (\$25,000,000) Dollars, and certified copies of said alleged awards had been or will be filed with the Department of State.

26. That, pursuant to Section 2 of the Settlement of War Claims Act of 1928, the defendant, Secretary of State, is about to certify to the defendant, Secretary of Treasury, the said awards of the aforesaid Commission. The Secretary of the Treasury is about to pay to the alleged claimants an amount equal to the principal of each of the awards so certified to the respective holders of said awards out of the funds in the Treasury known as the "German Special Deposit Account" and created under Section 4 of the said Settlement of War Claims Act of 1928 to the extent that the said fund is sufficient to pay the same.

27. That the said German Special Deposit Account, at the present time, amounts to a sum estimated to be Twenty-four million (\$24,000,000) Dollars, including monies now on deposit and funds subject to call.

28. That, by reason of the aforesaid alleged awards to said alleged claimants aforementioned, the larger part of said Special Deposit Account will be consumed, and monies properly payable to this plaintiff and other awardholders mentioned in paragraph "8" will be diverted to the damage of this plaintiff and other awardholders similarly situated.

29. That, if the said petitions of the aforesaid alleged claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others for rehearing, had been dismissed as they should have been instead of having been allowed, there would be, under Section 4 of the Trading with the Enemy Act, substantially all of the said Special Deposit Account available to the plaintiff and other awardholders similarly situated for further payment on account of said awards.

30. That Germany under the Debt Funding Agreement of June 1930 has been in arrears of payments for many years and there is now due from Germany under said

Agreement a sum in excess of Three billion, ninety-three million, four hundred twenty-eight thousand, four hundred eight-two (RM 3,093,428,482) Reichsmarks; that there is no way of compelling Germany to make said payments.

31. That the said awards purported to be granted to the said claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others, are null and void by reason, *inter alia*, of the following:

(a) That the said agreement between the United States and Germany provides that the decisions of the Commission shall be accepted as final and binding upon the two governments; that the decision of said Commission of October 16, 1930, dismissing said claims was final and binding; and that, therefore, there was no jurisdiction on the part of the present alleged Commission to grant a rehearing or vacate its previous decision.

(b) That assuming that the said Commission had jurisdiction to grant a rehearing or to vacate its previous decision, by reason of the resignation of the said alleged German Commissioner on the first day of March, 1939, the said alleged Commission was without any power or jurisdiction to take any action until a new German Commissioner was appointed; that at the time of the alleged decision of June 15, 1939, and down to the time of the commencement of this action, no new German Commissioner had been appointed.

(c) That assuming that the Commission had jurisdiction to entertain the motion to reopen for fraud and collusion, its jurisdiction on March 1, 1939, was, under its own decisions rendered prior thereto, limited to that single question, and that by the retirement of the German Commissioner on that date the possibility of its acquiring jurisdiction to go further and enter into the merits was extinguished or at least suspended until the appointment of a new German Commissioner.

(d) That the statement, in the opinion of the said alleged American Commissioner, that there existed a disagreement between the two alleged national commissioners, entitling the alleged Umpire to decide the question whether the application for a rehearing should be granted, is not correct—the fact being that there was no disagreement;

that the aforesaid alleged Commission was in the midst of its deliberations, and that the two alleged national commissioners had not arrived at a disagreement; and that there was no certificate by the said alleged commissioners in writing to the alleged Umpire certifying—

(1) "any case or cases concerning which the alleged commissioners disagreed"; or

7 (2) "any point or points of difference that arose in the course of their proceedings accompanied or supplemented by any statement in writing of an opinion with respect to the decision of a case or cases, or point or points of difference, certified or otherwise";

as provided by aforesaid rule.

(e) That the only question pending before the alleged Commission at the alleged hearing on the 15th day of June, 1939, was the question whether the application for rehearing should be granted; that it was claimed by the alleged German Agent prior thereto that the alleged Commission was without jurisdiction; that assuming that the said alleged Commission as composed in January 1939, had jurisdiction to grant or vacate the previous decision of the Commission as composed on October 16, 1930, then, by reason of the resignation of the said alleged German Commissioner on the 1st day of March, 1939, the said alleged Commission was without any power or jurisdiction to grant a rehearing or to direct the entry of an award, and therefore, the order granting such rehearing and directing the entry of an award was without jurisdiction and null and void.

(f) That the direction for the entry of an award was without notice to the German Government.

(g) That, assuming that the alleged Commission had jurisdiction to grant a rehearing or to vacate its previous decision, there never was submitted to the two governments, their representatives or agents or the aforesaid alleged Commission the question of the amount of any damages suffered by said claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others, and there never has been submitted to said alleged Commission proof of damages suffered by said claimants; that there has been

no agreement of the alleged Commission as to the amount of alleged damage, nor has there been any disagreement of the alleged Commission certified in writing to the alleged Umpire or otherwise as to the amount of damage, and therefore no basis, in fact, existed for the entry of an award in any amount.

(h) That the statement, in the opinion of the aforesaid alleged American Commissioner that the German Government was not willing to participate in the proceedings before the Commission and wanted to avoid a final conclusion, is incorrect, and there was no basis for said statement.

(i) That, assuming that the said alleged Commission had jurisdiction to grant a rehearing or to vacate its previous decision, the aforesaid Agency of Canadian Car & Foundry Company, Limited, is a corporation organized under the laws of the State of New York, whose stock is entirely owned by a Canadian national, to wit, the Canadian Car & Foundry Company, Limited, a Canadian corporation; and therefore the entry of an award in favor of the said Agency of Canadian Car & Foundry Company, Limited, is wholly null and void and without jurisdiction on the part of the alleged Commission; and the proceeds of said award under an agreement between the Agency of the Canadian Car & Foundry Company, Limited, and the parent company would go to the parent company, a Canadian national.

(j) That assuming but not conceding the said alleged Commission had jurisdiction to grant a rehearing or to vacate its previous decision, several of the other alleged claimants in whose favor awards were granted are corporations whose stock is or was owned by foreign nationals. Accordingly, the entry of an award in favor of such alleged claimants or any of them is wholly null and void and without jurisdiction on the part of the alleged Commission.

32. That the question which is the subject of this action is one of common and general interest to all holders of awards heretofore made by the Mixed Claims Commission mentioned in paragraph "8" hereof.

33. That the plaintiff is without adequate remedy at law. Wherefore, plaintiff, demands judgment declaring:

(a) That the decision of the Mixed Claims Commission of October 16, 1930, is final and binding and that all proceedings purported to be had by said Commission or the aforesaid alleged Commission thereafter are null and void;

(b) That the said awards granted to the said Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others, be declared null and void;

(c) That the defendant, Cordell Hull, Secretary of State of the United States, be enjoined and restrained from certifying to the Secretary of the Treasury any and all alleged awards to claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others;

(d) That the Secretary of the Treasury be restrained and enjoined from paying the amount of any awards to the said claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others;

(e) That the said Cordell Hull and the said Henry Morgenthau be restrained therefrom during the pendency of this action.

(f) That the Secretary of the Treasury be directed to pay to the plaintiff and other holders of awards of the Mixed Claims Commission, other than the said sabotage claimants, the balance remaining in the German Special Deposit Account to the extent provided for in the Settlement of War Claims Act of 1928.

(g) That the plaintiff be awarded the costs and disbursements of this action and such other and further relief in the premises as to the Court may seem proper.

HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
FRANK ROBERSON,

Attorneys for Plaintiff,
Office & P. O. Address,
Munsey Building,
Washington, D. C.

9 STATE OF NEW YORK,
County of New York—ss.:

Frederick Greenman, being duly sworn, deposes and says that he is Vice President of Z. & F. Assets Realization Corporation, the corporation named in the within entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by Z. & F. Assets Realization Corporation is because the said Z. & F. Assets Realization Corporation is a corporation and the grounds of deponent's belief as to all matters in the said complaint not stated upon his own knowledge, are investigations which deponent has caused to be made concerning the subject matter of this complaint and information acquired by deponent in the course of his duties as an officer of the said Z. & F. Assets Realization Corporation and from the books and papers of said corporation.

FREDERICK GREENMAN.

Sworn to before me this 30th day of October, 1939.

SAMUEL BLACK,

Notary Public,

Queens Co. #149.

Cert. filed N. Y. Co. #2.

Commission expires Mar. 30, 1940.

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EXHIBIT A.

TREATY SERIES, NO. 665.

AGREEMENT

BETWEEN

THE UNITED STATES AND GERMANY

FOR A

MIXED COMMISSION TO DETERMINE THE AMOUNT TO BE PAID BY GERMANY
IN SATISFACTION OF GERMANY'S FINANCIAL OBLIGATIONS
UNDER THE TREATY CONCLUDED BETWEEN THE
TWO GOVERNMENTS ON AUGUST 25, 1921

SIGNED AUGUST 10, 1922

(Government Seal)

Agreement.

The United States of America
and
Germany

being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

Abkommen.

Die Vereinigten Staaten von
Amerika
und
Deutschland,

von dem Wunsche beseelt, die Summe festzusetzen, die Deutschland in Erfüllung seiner finanziellen Verpflichtungen aus dem zwischen den beiden Regierungen am 25. August 1921 abgeschlossenen Vertrag zu zahlen hat, welcher den Vereinigten Staaten und deren Staatsangehörigen in einem Beschluss des Kongresses der Vereinigten Staaten vom 2. Juli 1921 näher bezeichnete Rechte, einschliesslich solcher aus dem Vertrag von Versailles sich ergebend, haben beschlossen, die Fragen zur Entscheidung einer gemischten Kommission zu überweisen und haben zu ihren Bevollmächtigten für den Abschluss des nachstehenden Abkommens ernannt:

THE PRESIDENT OF THE
UNITED STATES OF AMERICA

ALANSON B. HOUGHTON, Ambassador Extraordinary and

der Präsident der Vereinigten Staaten von Amerika.

den ausserordentlichen und bevollmächtigten Botschafts-

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Plenipotentiary of the United States of America to Germany,

and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. WIRTH, Chancellor of the German Empire,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ter der Vereinigten Staaten von Amerika in Deutschland Alanson B. Houghton und

der Präsident des Deutschen Reichs

den Deutschen Reichskanzler Dr. Wirth,

welche nach Austausch ihrer für gut und richtig befundenen Vollmachten folgendes vereinbart haben:

ARTICLE I.

Artikel I.

The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

Die Kommission soll über die folgenden Arten von Ansprüchen befinden, die des Näheren im Vertrag vom 25. August 1921 und in dem Vertrag von Versailles bezeichnet sind:

1. Ansprüche amerikanischer Bürger, die seit dem 31. Juli 1914 aus der Schädigung oder Beschlagnahme ihrer Güter, Rechte und Interessen erwachsen sind, einschliesslich jeder Gesellschaft oder Vereinigung, an denen sie beteiligt sind, innerhalb des Deutschen Reichsgebiets, wie es am 1. August 1914 bestand;

2. Andere Ansprüche aus Verlust oder Schaden, den die Vereinigten Staaten oder ihre Staatsangehörigen infolge des Krieges durch Verletzung von Personen oder von Gütern, von Rechten und Interessen, einschliesslich jeder Gesellschaft oder Vereinigung, an denen amerikanische Staatsangehörige beteiligt sind, seit dem 31. Juli 1914 erlitten haben;

3. Schulden der Deutschen Regierung oder deutscher Staatsangehöriger an amerikanische Bürger.

ARTICLE II.

Artikel II.

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an un-

Die Regierung der Vereinigten Staaten und die Deutsche Regierung sollen je einen Kommissar ernennen. Die beiden Regierungen sollen auf Grund einer

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pire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

Vereinbarung einen Unparteiischen auswählen, um über alle Fälle zu entscheiden, in denen die Kommissare verschiedener Meinung sein sollten, oder über alle strittigen Punkte, die sich im Laufe der Verhandlungen zwischen ihnen ergeben sollten.

Sollte der Unparteiische oder einer der Kommissare sterben oder zurücktreten oder aus irgend einem Grunde nicht in der Lage sein, seinen Obliegenheiten nachzukommen, so soll dasselbe Verfahren, das bei seiner Ernennung beobachtet worden ist, für die Neubesetzung der freigewordenen Stelle angewandt werden.

ARTICLE III.

Artikel III.

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

Die Kommissare sollen innerhalb zweier Monate nach dem Inkrafttreten dieses Abkommens in Washington zusammentreten. Sie können Zeit und Ort ihrer weiteren Zusammenkünfte festsetzen, wie es zweckmässig erscheint.

ARTICLE IV.)

Artikel IV.

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

Die Kommissare sollen die ihnen unterbreiteten Fragen und Fälle sorgfältig registrieren, und genaue Protokolle über ihre Verhandlungen führen. Zu diesem Zwecke kann jede der beiden Regierungen einen Sekretär ernennen, und diese Sekretäre sollen als gemeinsame Sekretäre der Kommission zusammenarbeiten und sollen deren Weisungen unterworfen sein.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

Die Kommission kann auch irgendwelche andere erforderliche Beamte zur Unterstützung bei der Ausübung ihrer Aufgaben ernennen und anstellen. Die jedem derartigen Beamten zu zahlende Vergütung soll der Zustimmung beider Regierungen unterliegen.

ARTICLE V.

Artikel V.

Each Government shall pay its own expenses, including compen-

Jede Regierung soll ihre eigenen Ausgaben, einschliesslich der

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sation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

Vergütung an ihren eigenen Kommissar, Vertreter oder Anwalt bezahlen. Alle anderen Ausgaben, die ihrer Natur nach beiden Regierungen zur Last fallen, einschließlich der Bestüge für den Unparteiischen, sollen von den beiden Regierungen zu gleichen Teilen getragen werden.

ARTICLE VI

Artikel VI.

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

Die beiden Regierungen können Vertreter und Anwälte bestimmen, die der Kommission mündliche oder schriftliche Beweisgründe unterbreiten können.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

Die Kommission soll alle schriftlichen Erklärungen oder Urkunden, die ihr von einer der beiden Regierungen oder zu ihren Gunsten zwecks Unterstützung eines Anspruchs oder zur Erwiderung auf einen solchen vorgelegt werden, in Empfang nehmen und berücksichtigen.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

Die Entscheidungen der Kommission und die des Unparteiischen (falls solche vorkommen sollten) sollen als entgültig und für die beiden Regierungen bindend angenommen werden.

ARTICLE VII.

Artikel VII.

The present agreement shall come into force on the date of its signature.

Dieses Abkommen soll am Tage der Unterzeichnung in Kraft treten.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Zu Urkund dessen haben die obengenannten Bevollmächtigten das vorliegende Abkommen unterzeichnet und ihre Siegel beigefügt.

Done in duplicate at Berlin this tenth day of August, 1922.

Ausgefertigt in doppelter Urschrift in Berlin am 10. August 1922.

[SEAL.]

ALANSON B. HOUGHTON.

[SEAL.]

ALANSON B. HOUGHTON.

[SEAL.]

WIRTH.

[SEAL.]

WIRTH.

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14. (EXCHANGE OF NOTES.)

*(The German Chancellor to the American Ambassador at
Berlin.)*

(Translation.)

Foreign Office.

No. III A 2451.

Berlin, August 10, 1922.

Mr. Ambassador,

In reply to your kind note of June 23, 1922, I have the honor to state to your Excellency as follows:

The German Government is in agreement with the draft of an agreement communicated to it in the note mentioned, now that some changes in the text have been agreed upon with your Excellency. I have the honor to transmit herewith the draft modified accordingly.

From the numerous conferences which have taken place with your Excellency, the German Government believes itself justified in assuming that it is not the intention of the American Government to insist in the proceedings of the Commission upon all the claims contemplated in the Versailles Treaty without exception, that it in particular does not intend to raise claims such as those included in Paragraphs 5 to 7 of Annex 1 of Article 244 of the Versailles Treaty (claims for reimbursement of military pensions paid by the American Government, and of allowances paid to American prisoners of war or their families and to the families of persons mobilised) or indeed claims going beyond the Treaty of August 25, 1921.

The German Government would be grateful if your Excellency would confirm the correctness of this assumption.

In the view of the German Government it would furthermore be in the interest of both Governments concerned that the work of the Commission be carried out as quickly as possible. In order to insure this it might be expedient to fix a period for the reporting of the claims to be considered by the Commission. The German Government, therefore, proposes that the Commission should consider only such claims as are brought before it within at least six months after its first meeting as provided in Article III of the above-named agreement.

I should be obliged to your Excellency for a statement as to whether the American Government is in agreement herewith.

At the same time I take advantage of this occasion to renew to you, Mr. Ambassador, the assurance of my most distinguished consideration.

WIRTH.

(The American Ambassador at Berlin to the German Chancellor.)

No. 128.

AMERICAN EMBASSY,

Berlin, August 10, 1922.

Mr. Chancellor:

I have the honor to acknowledge the receipt of your note of today's date transmitting the draft of the agreement enclosed to you in my note of June 23, as modified as a result of the negotiations that have been carried on between us.

15 In accordance with the instructions that I have received from my Government, I am authorized by the President to state that he has no intention of pressing against Germany or of presenting to the Commission established under the claims agreement any claims not covered by the Treaty of August 25, 1921, or any claims falling within Paragraphs 5 to 7, inclusive, of the annex following Article 244 of the treaty of Versailles.

With regard to your suggestion that the Commission shall only consider such claims as are presented to it within six months after its first meeting, as provided for in Article III, I have the honor to inform you that I am now in receipt of instructions from my Government to the effect that it agrees that notices of all claims to be presented to the Commission must be filed within the period of six months as above stated.

I avail myself once more of the opportunity to renew to you, Mr. Chancellor, the assurances of my most distinguished consideration.

A. B. HOUGHTON.

DR. WIRTH,

*Chancellor of the German Empire,
Berlin.*

16 District Court of the United States
For the District of Columbia

Civil Action No. 4598

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation, with an office and place of business at 100 Broadway, in the City, County and State of New York, and

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a New Jersey corporation, with an office and place of business at 90 Broad Street, in the City, County and State of New York,

Plaintiffs,

—against—

CORDELL HULL, Secretary of State and HENRY MORGENTHAU, JR., Secretary of Treasury,

Defendants,

LEHIGH VALLEY RAILROAD COMPANY, of 143 Liberty Street, New York, N. Y.,

Intervenor.

Bill of Intervention

Filed December 12, 1939.

The plaintiffs seek an injunction and decree directing payment of money.

The plaintiff Z. & F. Assets Realization Corporation, above named, by Hubert E. Rogers, John F. Condon, Jr., and Frank Roberson, its attorneys, and the plaintiff American-Hawaiian Steamship Company by Fred K. Nielsen, its attorney, on information and belief, alleges as follows:

1. That Z. & F. Assets Realization Corporation of 100 Broadway, City, County and State of New York, plaintiff, is a corporation organized under the laws of the State of Delaware and has been such since the 17th day of March, 1924.

2. That American-Hawaiian Steamship Company of 90 Broad Street, City, County and State of New York, petitioner herein, is a corporation organized under the laws of the State of New Jersey.

3. That on or about August 10, 1922, an agreement was entered into between the United States and Germany for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded between the two governments on August 25, 1921.

4. A copy of said agreement is hereto annexed and marked *Exhibit A*.

5. That pursuant to said agreement a mixed commission was created consisting of an American commissioner, a German commissioner and an umpire. That on October 16, 1930, the said Commission consisted of Roland W. Boyden, Umpire, Chandler P. Anderson, American Commissioner and Wilhelm Kisselbach, German Commissioner. That thereafter the said Umpire and the said American Commissioner died, and said German Commissioner resigned. That said Commission will hereafter be referred to as the Mixed Claims Commission.

6. That on or about the 24th day of March, 1932, Hon. Owen J. Roberts was appointed Umpire of said Commission and since that date has purported to act as such.

7. That on or about the 31st day of May, 1934, Victor C. Huecking was appointed German Commissioner and purported to act as such until the first day of March, 1939, when he resigned.

8. That on or about September 12, 1936, Christopher B. Garnett was appointed American Commissioner and that said Garnett has since that date purported to act as such Commissioner.

9. That Zimmermann & Forshay, a partnership consisting of Messrs. Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumerthal, Isaac Gutenstein and David Forshay duly filed claims with said Commission, and thereafter the said claims and all rights thereunder were duly transferred and assigned, by assignment dated the 10th day of April, 1924, to plaintiff, a corporation organized for the purpose of liquidation and distribution of the assets of the former firm of Zimmermann & Forshay, pursuant to order of the United States District Court for the Southern District of New York. That the said Commission thereupon duly granted five awards in favor of the said plaintiff, Z. & F. Assets Realization Cor-

poration which with interest from certain dates to January 1, 1928 aggregate the sum of One million one hundred seventy-five thousand nine hundred eighteen and 78/100 (\$1,175,918.78) Dollars, docket Nos. 6997, 7023, 7948, 8199 and 8369, on which plaintiff Z. & F. Assets Realization Corporation has received on account the sum of Eight hundred sixty-four thousand forty-eight and 31/100 (\$864,048.31) Dollars, leaving a balance unpaid of Three hundred eleven thousand eight hundred seventy and 47/100 (\$311,870.47) Dollars, which with interest from January 1, 1928 to January 15, 1936 of Two hundred eighty-seven thousand five hundred three and 49/100 (\$287,503.49) Dollars, makes a total aggregate unpaid balance of Five hundred ninety-nine thousand three hundred seventy-three and 96/100 (\$599,373.96) Dollars.

10. That the said Commission duly granted five awards in favor of the plaintiff, American-Hawaiian Steamship Company, which, with interest from certain dates to January 1, 1928, aggregate the sum of Four million six hundred twenty thousand one hundred thirty-one and 57/100 (\$4,620,131.57) Dollars, on which the plaintiff, American-Hawaiian Steamship Company, has received, on account, the sum of approximately Three million three hundred thousand (\$3,300,000) Dollars, leaving a balance unpaid in excess of One million two hundred fifty thousand (\$1,250,000) Dollars, which, with interest from January 1, 1928 to this date, makes a total aggregate unpaid balance in excess of Two million (\$2,000,000) Dollars.

18 11. That prior to December 31, 1931, numerous claimants, having previously filed claims with said Commission, were duly granted awards by the said Commission in an amount in excess of One hundred fifty million (\$150,000,000) Dollars, on which they have received various payments out of a fund provided therefor by an Act of Congress and more particularly referred to hereafter, leaving an unpaid balance in excess of Thirty-five million (\$35,000,000) Dollars on the principal amount of their claims, and approximately Twenty-eight million (\$28,000,000) Dollars in accrued interest.

12. That prior to the 16th day of October, 1930, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company,

and others, filed claims with the said Mixed Claims Commission, which claims were, on October 16, 1930, duly dismissed by said Commission. An application for a rehearing upon said claims was denied on March 30, 1931, and likewise a second application for rehearing of said claims was denied on December 3, 1932. That the Governments of the United States and Germany were duly advised of said decisions.

13. That on May 4, 1933, there was filed with what purported to be the Mixed Claims Commission by said Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited and Bethlehem Steel Company, and others, another application for rehearing of the decision dismissing said claims.

14. That on June 3, 1936, the said alleged Commission handed down its decision whereby it decided that the application for rehearing under the petition of May 4, 1933, must be determined by a hearing separate and distinct from any argument on the merits of the controversy.

15. That in the month of January, 1939, argument was had before what purported to be the American Commissioner, the German Commissioner and the Umpire, purporting to act as such Mixed Claims Commission, which argument was attended by what purported to be the Agent for the United States Government, and the Agent for the German Government and which argument commenced on the 16th day of January, 1939, and continued until the 27th day of January, 1939, at which time decision was reserved by the body purporting to act as a Commission.

16. That thereafter the aforesaid alleged American Commissioner, the alleged German Commissioner and the alleged Umpire entered upon their deliberations on the single question whether fraud and collusion had been established sufficiently to justify a rehearing of said claims, which deliberations had not been concluded on the first day of March, 1939, on which date the aforesaid alleged German Commissioner resigned and took no further part in the deliberations of the aforesaid alleged Commission.

17. That thereafter, on or about the 7th day of June, 1939, the aforesaid alleged American Commissioner, by an alleged notice to the alleged German Agent purported to call a meeting of the aforesaid alleged Commission, to be

held on the 15th day of June, 1939; that at said time there had been no commissioner appointed in the place and stead of said German Commissioner who had resigned.

19 18. That the aforesaid alleged American Commissioner had no authority to call said meeting.

19. That on the 15th day of June, 1939, the aforesaid alleged American Commissioner and the aforesaid alleged Umpire purported to hold a meeting of the said Commission in the absence of any alleged German Commissioner, and at said meeting there was delivered and filed by the aforesaid alleged American Commissioner an alleged certificate purporting to be a certificate of disagreement and purporting to certify to the aforesaid alleged Umpire that there was a disagreement between the aforesaid alleged American Commissioner and the aforesaid alleged German Commissioner on material points before the aforesaid alleged Commission other than the one question, to wit, whether the application for rehearing should be granted, together with an opinion of the aforesaid alleged American Commissioner, in which opinion the aforesaid alleged American Commissioner stated that there had been a disagreement between the said aforesaid alleged German Commissioner and the aforesaid alleged American Commissioner prior to the resignation of aforesaid alleged German Commissioner, as to whether application for rehearing should be granted; and likewise, the aforesaid alleged American Commissioner, in said certificate, purported to certify that such disagreement existed; and in the said alleged certificate and opinion included therewith it was claimed by the aforesaid alleged American Commissioner that the aforesaid alleged Umpire was entitled to decide the alleged points of difference between the aforesaid alleged American Commissioner and the aforesaid alleged German Commissioner.

20. That Article VIII of the Rules of Procedure adopted by said Commission reads as follows:

"(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision

of the case or cases or point or points of difference certified."

21. That, although according to the aforesaid rule that certificates of disagreement should be signed by the two national commissioners, said certificate of alleged disagreement was certified to only by the aforesaid alleged American Commissioner and not certified to by the aforesaid alleged German Commissioner.

22. That, upon the filing of said certificate and the opinion of the aforesaid alleged American Commissioner at said hearing on June 15, 1939, the said alleged Umpire handed down his decision granting the said application for rehearing.

23. That prior to the 15th day of June, 1939, to wit, at some time in the year 1929, it was duly stipulated between the American and German Agents of the said Commission, with the approval of the Commission, to postpone any discussion of the question of the amount of damages sustained to aforesaid alleged claimants—both in

20 respect to the issues of fact and the questions of law involved—until after the determination of the question of Germany's responsibility for acts complained of as a basis of Germany's liability; that pursuant to said stipulation and prior to and on the first day of March, 1939, at the time when the resignation of the alleged German Commissioner took place and down to and past the 15th day of June, 1939, and down to the commencement of this action there had been no proofs of the amount of damages sustained by the alleged claimants submitted to the Commission; that there has been no agreement arrived at by the American and German Agents as to the amount of damages sustained by said alleged claimants, nor has there been any decision by the two Commissioners and no certificate of disagreement on this question.

24. That thereupon the aforesaid alleged American Agent at said alleged hearing on June 15, 1939, and without any hearing on the merits having been had, made application that awards be granted to all the claimants who had made application for rehearing, namely, the said Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others.

25. That thereupon the aforesaid alleged Umpire not-

withstanding the resignation of the German Commissioner on March 1, 1939, and notwithstanding that no new German Commissioner had then been appointed or was acting, without the presence of any German Commissioner and without notice of any kind to the German Government or the German Agent, without any rehearing and without any submission to the German Agent, or to any German Commissioner, of any proofs on the amount of damages, either in respect of the issues of fact or the questions of law involved granted said motion; and thereafter the said Empire signed and filed, with the concurrence of the American Commissioner documents purporting to be awards in favor of said claimants, to wit, the Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others; and upon information and belief that certain of said claimants were in whole or in part insured by insurance companies for the payments of some or all of the damages alleged to have been suffered by said claimants and said last mentioned claimants received from said insurance companies payment of part or of all of the damages so sustained; and by right of subrogation, the said insurance companies likewise filed a claim for the amount of the said payments of said damages paid as above stated to the claimants last above mentioned; that in many instances, said insurance companies were at all times and still are corporations whose stock was and is owned by non American nationals and therefore, in any event, not entitled to collect the claims respectively filed by them as such subrogees to the extent of such non American national ownership.

26. On information and belief, that the said alleged American Commissioner, without notice to any German Commissioner or German Agent and without the presence of any German Commissioner or the German Agent, conferred with the American Agent and Counsel with respect to the claims of the said claimants and the amount of the awards to be rendered in favor of the said claimants and thereupon the said alleged American Commissioner, without knowledge or consent of any German Commissioner
 21 or knowledge or consent of the German Agent, signed awards to the said claimants for the amounts so fixed and assessed by the American Agent.

27. That the total of the aforesaid alleged awards so granted by the said Umpire, with the concurrence of the aforesaid American Commissioner, amounted with interest to a sum in excess of Thirty-one million (\$31,000,000) Dollars, and certified copies of said alleged awards had been or will be filed with the Department of State.

28. That, pursuant to Section 2 of the Settlement of War Claims Act of 1928, the defendant, Secretary of State, is about to certify to the defendant, Secretary of Treasury, the said awards of the aforesaid Commission. The Secretary of the Treasury is about to pay to the alleged claimants an amount equal to the principal of each of the awards so certified to the respective holders of said awards out of the funds in the Treasury known as the "German Special Deposit Account" and created under Section 4 of the said Settlement of War Claims Act of 1928 to the extent that the said fund is sufficient to pay the same.

29. That the said German Special Deposit Account, at the present time, amounts to a sum estimated to be Twenty-four million (\$24,000,000) Dollars, including monies now on deposit and funds subject to call.

30. That, by reason of the aforesaid alleged awards to said alleged claimants aforementioned, the larger part of said Special Deposit Account will be consumed, and monies properly payable to these plaintiffs and other awardholders mentioned in paragraph "11" will be diverted to the damage of these plaintiffs and other awardholders similarly situated.

31. That, if the said petitions of the aforesaid alleged claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others for rehearing, had been dismissed as they should have been instead of having been allowed, there would be, under Section 4 of the Trading with the Enemy Act, substantially all of the said Special Deposit Account available to these plaintiffs and other awardholders similarly situated for further payment on account of said awards.

32. That Germany under the Debt Funding Agreement of June 1930 has been in arrears of payments for many years and there is now due from Germany under said Agreement a sum in excess of Three billion, ninety-three

million, four hundred twenty-eight thousand, four hundred eighty-two (RM 3,093,428,482) Reichsmarks; that there is no way of compelling Germany to make said payments.

33: That the said awards purported to be granted to the said claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others, are null and void by reason, inter alia, of the following:

(a) That the said agreement between the United States and Germany provides that the decisions of the Commission shall be accepted as final and binding upon the two governments; that the decision of said Commission of October 16, 1930, dismissing said claims was final and binding; and that, therefore, there was no jurisdiction on the part of the present alleged Commission to grant a rehearing or vacate its previous decision.

(b) That assuming that the said Commission had jurisdiction to grant a rehearing or to vacate its previous decision, by reason of the resignation of the said alleged German Commissioner on the first day of March, 1939, the said alleged Commission was without any power or jurisdiction to take any action until a new German Commissioner was appointed; that at the time of the alleged decision of June 15, 1939, and down to the time of the commencement of this action, no new German Commissioner had been appointed.

(c) That assuming that the Commission had jurisdiction to entertain the motion to reopen for fraud and collusion, its jurisdiction on March 1, 1939, was, under its own decisions rendered prior thereto, limited to that single question, and that by the retirement of the German Commissioner on that date the possibility of its acquiring jurisdiction to go further and enter into the merits was extinguished or at least suspended until the appointment of a new German Commissioner.

(d) That the statement, in the opinion of the said alleged American Commissioner, that there existed a disagreement between the two alleged national commissioners, entitling the alleged Umpire to decide the question whether the application for a rehearing should be granted, is not correct—the fact being that there was no disagreement; that the aforesaid alleged Commission was in the midst of its deliberations, and that the two alleged national com-

missioners had not arrived at a disagreement; and that there was no certificate by the said alleged commissioners in writing to the alleged Umpire certifying—

(1) “any case or cases concerning which the alleged commissioners disagreed”; or

(2) “any point or points of difference that arose in the course of their proceedings accompanied or supplemented by any statement in writing of an opinion with respect to the decision of a case or cases, or point or points of difference, certified or otherwise”;

as provided by aforesaid rule.

(e) That the only question pending before the alleged Commission at the alleged hearing on the 15th day of June, 1939, was the question whether the application for rehearing should be granted; that it was claimed by the alleged German Agent prior thereto that the alleged Commission was without jurisdiction; that assuming that the said alleged Commission as composed in January 1939, had jurisdiction to grant or vacate the previous decision of the Commission as composed on October 16, 1930, then, by reason of the resignation of the said alleged German Commissioner on the 1st day of March, 1939, the said alleged Commission was without any power or jurisdiction to grant a rehearing or to direct the entry of an award, and therefore,
 23 the order granting such rehearing and directing the entry of an award was without jurisdiction and null and void.

(f) That the direction for the entry of an award was without notice to the German Government.

(g) That, assuming that the alleged Commission had jurisdiction to grant a rehearing or to vacate its previous decision, there never was submitted to the two governments, their representatives or agents or the aforesaid alleged Commission the question of the amount of any damages suffered by said claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others, and there never has been submitted to said alleged Commission proof of damages suffered by said claimants; that there has been no agreement of the alleged Commission as to the amount of alleged damage, nor has there been any dis-

agreement of the alleged Commission certified in writing to the alleged Umpire or otherwise as to the amount of damage, and therefore no basis, in fact, existed for the entry of an award in any amount.

(h) That the statement, in the opinion of the aforesaid alleged American Commissioner that the German Government was not willing to participate in the proceedings before the Commission and wanted to avoid a final conclusion, is incorrect and there was no basis for said statement.

(i) That, assuming that the said alleged Commission had jurisdiction to grant a rehearing or to vacate its previous decision, the aforesaid Agency of Canadian Car & Foundry Company, Limited, is a corporation organized under the laws of the State of New York, whose stock is entirely owned by a Canadian national, to wit, the Canadian Car & Foundry Company, Limited, a Canadian corporation, and therefore the entry of an award in favor of the said Agency of Canadian Car & Foundry Company, Limited, is wholly null and void and without jurisdiction on the part of the alleged Commission; and the proceeds of said award under an agreement between the Agency of the Canadian Car & Foundry Company, Limited, and the parent company would go to the parent company, a Canadian national.

(j) That assuming but not conceding the said alleged Commission had jurisdiction to grant a rehearing or to vacate its previous decision, several of the other alleged claimants in whose favor awards were granted are corporations whose stock is or was owned by foreign nationals. Accordingly, the entry of an award in favor of such alleged claimants or any of them is wholly null and void and without jurisdiction on the part of the alleged Commission.

34. That the question which is the subject of this action is one of common and general interest to all holders of awards heretofore made by the Mixed Claims Commission mentioned in paragraph "8" hereof.

35. That the plaintiffs are without adequate remedy at law.

24 WHEREFORE, plaintiffs demand judgment declaring:

(a) That the decision of the Mixed Claims Commission of October 16, 1930, is final and binding, and that all pro-

ceedings purported to be had by said Commission or the aforesaid alleged Commission thereafter are null and void;

(b) That the said awards granted to the said Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others, be declared null and void;

(c) That the defendant, Cordell Hull, Secretary of State of the United States, be enjoined and restrained from certifying to the Secretary of the Treasury any and all alleged awards to claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others;

(d) That the Secretary of the Treasury be restrained and enjoined from paying the amount of any awards to the said claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others;

(e) That the said Cordell Hull and the said Henry Morgenthau be restrained therefrom during the pendency of this action.

(f) That the Secretary of the Treasury be directed to pay to the plaintiffs and other holders of awards of the Mixed Claims Commission, other than the said sabotage claimants, the balance remaining in the German Special Deposit Account to the extent provided for in the Settlement of War Claims Act of 1928.

(g) That the plaintiffs be awarded the costs and disbursements of this action and such other and further relief in the premises as to the Court may seem proper.

FRED K. NIELSEN,

Attorney for Plaintiff American-Hawaiian Steamship Company,

Union Trust Co. Building,
Washington, D. C.

26 District Court of the United States
District of Columbia

Civil Action File No. 4598

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation, with an office and place of business at 100 Broadway, in the City, County and State of New York,
Plaintiff,

against

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of Treasury, *Defendants.*

LEHIGH VALLEY RAILROAD COMPANY, *Intervener.*

Intervener's Answer

Filed November 22, 1939.

Intervener, on its own behalf, and on behalf of all other holders of awards by the Mixed Claims Commission granted pursuant to the decisions of said Commission dated June 15, 1939 and October 30, 1939, answers the complaint herein as follows:

First Defense

1. The complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

2. This Court is without jurisdiction to review the action of the Mixed Claims Commission. All the questions decided by the Commission preliminary to and including the entry of the awards on October 30, 1939 came before the Commission in due course, and their decision was necessary to the final disposition of the claims on which the awards were rendered and were within the jurisdiction of the Commission. By the terms of the Treaty and Agreement pursuant to which the Commission was constituted, final awards of the Commission are binding and conclusive and not subject to review by any court and this Court is without jurisdiction to set aside or impeach such awards.

Third Defense

3. The awards entered October 30, 1939, have been accepted by the United States, acting through the Secretary of State of the United States. The Secretary, on October 31, 1939, prior to the commencement of this action, determined that the United States had no reason to take exception to the awards, or to refrain from executing them, and duly certified the awards to the Secretary of the Treasury for payment, pursuant to the provisions of the "Settlement of War Claims Act of 1928". Such determination
27 by the executive department of the Government is not subject to review by this Court.

Fourth Defense

4. The decisions and actions of the Commission preliminary to and including the entry of the final awards of October 30, 1939, were correct and justified both in fact and in law.

Fifth Defense

5. On August 10, 1922, an Agreement was entered into between the United States and Germany for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty of August 25, 1921, in respect of claims of nationals of the United States against Germany for loss, damage or injury to their persons or property by reason of acts of the German Government or of its agents since July 31, 1914, a copy of which Agreement is annexed to the complaint herein as Exhibit A.

6. Pursuant to said Agreement, the Commission therein provided for was subsequently created, which Commission was and is known as Mixed Claims Commission, United States and Germany (hereinafter sometimes referred to as the Commission), and an American Commissioner, a German Commissioner and an Umpire were appointed to said Commission.

7. On October 16, 1930, the Commission was constituted of the Honorable Roland W. Boyden, Umpire, the Honorable Chandler P. Anderson, American Commissioner, and Dr. Wilhelm Kiesselbach, German Commissioner. On Oc-

tober 25, 1931, Umpire Boyden died and on March 24, 1932, Mr. Justice Owen J. Roberts was, with the approval of the two Governments, commissioned Umpire to succeed Mr. Boyden and since that date has acted as such Umpire. The German Commissioner, Dr. Kiesselbach, served as German Commissioner until May 31, 1934, when the appointment was announced of his successor, Dr. Victor L. F. H. Huecking, who acted as such Commissioner until March 1, 1939. On or about August 2, 1936, the American Commissioner, Mr. Anderson, died and on September 12, 1936, Mr. Christopher B. Garnett was appointed by the American Government as American Commissioner to succeed him and since that date has acted as such Commissioner. On March 1, 1939, Dr. Huecking voluntarily retired as German Commissioner under circumstances hereinafter more fully set forth, and the German Government has failed to announce the appointment of any Commissioner to succeed him.

8. In or about March, 1927, the United States of America, by Robert W. Bonyng, Agent, filed claims with the Commission on behalf of Intervener Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company and others (hereinafter sometimes called the sabotage claimants), arising out of the destruction of property by reason of explosions at Black Tom, New Jersey, in 1916, and at Kingsland, New Jersey, in 1917.

9. Proofs in support of the claims made on behalf of the sabotage claimants, including proofs of the amounts of damage sustained by such claimants, were thereafter from time to time submitted to the Commission. In connection with the consideration of such claims, the Commission established a special practice, pursuant to which the Umpire as well as the National Commissioners attended hearings and participated in deliberations thereon. In the argument on such claims in 1929, the American and German Agents agreed to postpone argument on the question of the measure of damages sustained by said claimants until after the determination of the question of Germany's liability.

10. On October 16, 1930, the Commission rendered a decision dismissing the claims filed by the United States on

behalf of the sabotage claimants. Petitions for a rehearing of said claims upon the ground that the Commission had committed errors in its findings of fact on the evidence submitted, and in failing to apply established principles of law and rules of the Commission, were denied on March 30, 1931; and a further petition for a rehearing, upon the basis of newly discovered evidence, was denied by a decision rendered December 3, 1932.

11. On May 4, 1933, the United States of America, by Robert W. Bonyne, Agent, filed with the Commission on behalf of the sabotage claimants a petition for the reopening of the decisions in said claims, and for a rehearing, on the ground that the Commission had been misled in its decision of October 16, 1930, by fraudulent, incomplete, collusive and false evidence on the part of witnesses for Germany.

12. Thereafter the American and German Commissioners disagreed as to the power of the Commission to set aside its decision of October 16, 1930. Such disagreement was duly certified to the Umpire, by certificate of the American Commissioner, and on December 15, 1933, the Umpire rendered a decision, a copy of which is attached hereto as Exhibit I, holding that the Commission had jurisdiction to determine its own power to reopen prior decisions, a jurisdiction which the German Government had previously conceded, and that, under the Treaty and Agreement pursuant to which the Commission was constituted, it had the power to vacate the decision of October 16, 1930, and should do so if fraud and collusion should be established.

13. The United States thereupon filed with the Commission a motion requesting the Commission to fix the procedure to be followed, and to direct that on the next hearing the Commission consider both the question of granting a rehearing and the question of Germany's liability on the claims. On July 29, 1935, the Commission rendered a decision on said motion, stating that the procedure would be to consider first the question of granting a rehearing and later the merits of the claims.

29 14. In May, 1936, the Commission held extensive hearings upon the aforesaid petition of May 4, 1933,

and on June 3, 1936, rendered a decision, in which the German Commissioner concurred, by which it set aside its decision of December 3, 1932. The Commission further decided that the question whether it should grant a rehearing of the claims should, under its decision of July 29, 1935, be determined by a hearing separate and distinct from any argument on the merits, unless Germany should consent to a different course. Said decision of June 3, 1936, did not decide the question whether the decision of October 16, 1930, should be set aside for fraud and collusion, and left that for further hearing.

15. In January, 1939, the case was heard further by the Commission. Both sides briefed the question of Germany's liability on the claims, as well as the question of fraud and collusion. The American Agent stated in his brief:

"The respective governments have spent years in the collection of evidence without any restriction on its nature and almost without limitation as to the time afforded to file it. Since the 1936 hearing the German Agent has been permitted to file, and has filed, evidence without regard to whether it related to the so-called ~~fraud~~ issue or to the cases on the merits—a distinction which, for all practical purposes, has long since disappeared. By reason of the fact that it has been a requisite part of the American Agent's case to prove that the Commission has been misled on material issues by false evidence, the very proof which has been introduced to support the pending motions necessarily affects the merits of the cases. The Herrmann message, for example, alone establishes the responsibility of Germany; other contemporaneous documents which lead to the responsibility of Germany for the destructions simultaneously, prove the falsity of the entire German defense.

"Further argument on the merits would, therefore, be only a form and would constitute a source of delay not warranted by any considerations of justice to the parties.

"The American Agent, therefore, requests the Commission not only to set aside but to reverse the Hamburg decision and thus render a final decision in favor of the United States in both cases."

The German Agent in his briefs and oral argument took the position, in substance, that it would be futile to set aside the decision of October 16, 1930, because the record failed to establish Germany's responsibility for the Black Tom and Kingsland explosions, and a further hearing on that point would be useless. The oral argument of the German Agent was largely directed to the merits. During said hearing, the American Agent asserted that notwithstanding the procedural order of July 29, 1935, inasmuch as the case had been fully discussed from every possible standpoint by both sides, and Germany had by its argument invited a decision on the merits, the Commission should proceed not only to set aside the decision of October 16, 1930, but to render awards on the merits. At the hearing in January, 1939, there was submitted to the Commission for decision (a) the question whether the decision of October 16, 1930, should be set aside for fraud and collusion, (b) the question whether Germany's responsibility for the Black Tom and Kingsland explosions had been established, (c) the question whether, as claimed by the American Agent, the Commission should decide the merits of the claims without a further hearing, and (d) the question whether Germany's liability on the claims had been established. At the conclusion of the oral argument, which commenced January 16 and continued to January 27, decision on all questions submitted was reserved by the Commission.

16. Thereafter the Commission entered upon its deliberations upon the questions presented by the pleadings, briefs and oral argument. In the course of such deliberations, the German Commissioner expressed the conviction that the decision of October 16, 1930, should not be set aside, and the Umpire and American Commissioner expressed the conviction that it should be set aside, and thereupon a definite and final disagreement arose on that point. The German Commissioner insisted that the decision of October 16, 1930, should not be set aside because the record failed to establish Germany's responsibility for the explosions, and he thereby invited a finding on the question of liability. As a result of said deliberations, the German Commissioner learned that both the Umpire and the Amer-

ican Commissioner had concluded that the decision of October 16, 1930, should be set aside, and that on the record as it stood they both were ready to find that Germany was liable on the claims. Thereupon, solely for the purpose of frustrating further proceedings by the Commission and preventing the impending decision against Germany, and without justification, the German Commissioner, on March 1, 1939, voluntarily retired from the Commission and has ever since declined to take part in its proceedings. Since March 1, 1939, the German Government has refrained from appointing a new Commissioner, and has contented itself with protests against any action by the Commission, in the absence of a German Commissioner.

17. On or about June 7, 1939, the American Commissioner called a meeting of the Commission to be held on June 15, 1939, and caused notice thereof to be given to the German Agent. The German Government thereupon advised the United States Government that it did not recognize the power of the Commission to act in the absence of the German Commissioner, and would ignore the decision to call a meeting on June 15, 1939, as well as any further proceedings of the Commission; and the German Agent notified the Commission that in view of the foregoing advice, the German Agent would not appear at the meeting.

18. On June 15, 1939, a meeting of the Commission was held, attended by the American Commissioner and the Umpire. At that meeting, there was delivered and filed by the American Commissioner a Certificate of Disagreement and Opinion, certifying to the Umpire that there was a disagreement between the American Commissioner and the German Commissioner on all material points before said Commission, including the point as to whether the evidence which had been adduced had established fraud sufficient in character to justify the Commission in setting aside its decision of October 16, 1930, and further certifying that at the time when the German Commissioner retired the Commission was, at the instance of said German Commissioner, considering the question whether the American Agent had proven his case on the merits, and setting forth the opinion of the American Commissioner (a) that the voluntary retirement of the German Commissioner on

March 1, 1939, did not deprive the Commission of the power to decide the questions at issue at the time of his retirement, (b) that the Commission's decision of October 16, 1930, should be set aside, and the cases restored to their position before that decision was rendered, and (c) that the liability of Germany in said cases had been clearly established by the record.

19. Upon the filing of the Certificate and Opinion of the American Commissioner at the hearing on June 15, 1939, the Umpire handed down his decision, a copy of which is attached hereto as Exhibit II, holding that the retirement of the German Commissioner did not oust the jurisdiction of the Commission, that the Commission as then constituted had jurisdiction to dispose of the claims and that on the record as it then stood the claimants' cases had been made out, and setting aside the decision of October 16, 1930.

20. The American Agent thereupon made the following motion that awards be granted in favor of the United States on behalf of the sabotage claimants:

"If your Honors please, in view of the attitude of Germany, as expressed in the communications between the German Commissioner and the Umpire and the American Commissioner and the communication between the German Embassy and the Secretary of State of the United States, it is apparent that Germany does not intend to take any further part in the proceedings before this Commission, and seeks to avoid a final conclusion, and frustrate the work of the Commission. I therefore move at this time, if your Honors please, upon the record as it now stands, that awards be entered in accordance with the opinions which have been rendered today."

After due consideration thereof, the Commission granted said application and entered the following order upon the minutes of the Commission:

"1. The decision of October 16, 1930, reached at Hamburg be, and the same is hereby, set aside, revoked and annulled.

"2. The Commission finds, on the record as it now stands, that the liability of Germany in both the Black Tom and Kingsland cases has been established.

"3. It appearing from the communications, each dated June 10, 1939, one from the German Agent to the Commission, and the other from the German Embassy to the Secretary of State, that Germany does not intend to exercise her right to take further part in the proceedings of the Commission, and that on the findings made and opinions handed down this day by the Commission, and from what appears in the record, awards should now be rendered to the United States on behalf of claimants; the American Agent is directed to prepare and submit to the Commission for its approval awards in each of the pending sabotage claims. These awards will be considered at a further meeting of the Commission to be called on notice, and appropriate action thereon will then be taken."

21. Thereafter the Commission examined and considered the proofs before it on the question of damages sustained by the sabotage claimants, which proofs had been filed with the Commission long prior to January 1, 1939, and gave notice to the German Agent of a meeting to be held on October 30, 1939. The German Agent did not attend said meeting of October 30, 1939, and thereby waived the opportunity to object to the amounts of the awards or to be heard thereon.

22. On October 30, 1939, pursuant to its decision dated June 15, 1939, and after determination of the amounts of damages sustained, the Commission granted awards to the sabotage claimants in the several amounts set forth in the schedule attached hereto as Exhibit III, adjudging that the Government of Germany is obligated to pay to the Government of the United States on behalf of said claimants the amounts mentioned in said Exhibit. At said meeting of October 30, 1939, the Commission, the Unipire and American Commissioner concurring, filed an opinion holding that the claimant Agency of Canadian Car & Foundry Company, Limited, which was and is a New York corporation, was entitled to an award. The question of the status of that corporation had been fully argued in briefs filed with the Commission by Germany and the United States before the conclusion of the oral argument in January, 1939.

23. On March 10, 1928, the Congress of the United States enacted the so-called Settlement of War Claims Act of 1928 (45 Stat. 254), which Act

(a) created in the United States Treasury a German Special Deposit Account, composed in part of all sums invested or transferred by the Alien Property Custodian under the provisions of Section 25 of the Trading with the Enemy Act, as amended, and of all money received by the United States in respect of claims against Germany on account of the awards of the Mixed Claims Commission;

(b) directed the Secretary of State from time to time to certify to the Secretary of the Treasury the awards of the Mixed Claims Commission; and

(c) directed the Secretary of the Treasury to pay, out of the aforesaid German Special Deposit Account, an amount equal to the principal of each award so certified, plus interest thereon in accordance with the award.

24. The funds now available to the aforesaid German Special Deposit Account are, and at all times since October 30, 1939, have been, sufficient to pay to the sabotage claimants approximately the principal amounts of their respective awards.

25. In accordance with the Settlement of War Claims Act of 1928, as amended, the Secretary of State, on or about October 31, 1939, certified said awards to the Secretary of the Treasury, and thereafter substantially all the holders of said awards, including Intervener, duly filed with the Secretary of the Treasury applications for payment thereof.

26. Intervener admits the allegations in paragraphs 1, 18 and 19 of the complaint.

27. Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the complaint, except that it admits that the Mixed Claims Commission granted five awards in favor of plaintiff (Docket Nos. 6997, 7023, 7948, 8199 and 8369) aggregating a total principal amount of \$839,998.40, together with interest thereon at 5% per annum from certain dates, and that plaintiff has received on account of said awards the sum of \$864,048.31.

28. Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations in

paragraph 9 of the complaint, except that it admits that prior to December 31, 1931, awards were granted by the Commission in favor of the United States on behalf of numerous private claimants, on whose behalf claims had previously been filed with the Commission, in the total principal amount of approximately \$118,000,000, together with interest thereon from certain dates, on which payments in excess of \$135,000,000 have heretofore been made.

29. Intervener denies each and every allegation in paragraph 23 of the complaint, except as hereinabove admitted, and except that it admits that certain of the claimants therein mentioned were insured by insurance companies for the payment of some of the damages suffered by said claimants, which claimants had received from said insurance companies payment of part of the damages so sustained, and that claims had been filed with the Commission on behalf of said insurance companies for the amounts so paid to said claimants; and except that Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the ownership of the stock of the insurance companies therein mentioned.

30. Intervener denies each and every allegation in paragraph 24 of the complaint, except as hereinabove admitted, and except that Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning conferences between the American Commissioner and the American Agent and Counsel.

31. Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 27, 28 and 29 of the complaint, except

34 as hereinabove admitted, and except that it denies that the payment of the awards therein mentioned will cause to be diverted any moneys properly payable to plaintiff or to other award holders, and denies that the petitions filed on behalf of Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company and others, should have been dismissed.

32. Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30 of the complaint, except that it admits that

Germany has been for over five years in arrears of payment under the Debt Funding Agreement of June, 1930.

33. Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 32 of the complaint.

34. Except as hereinabove admitted or qualified, Intervener denies each and every allegation in the complaint.

*Cross-Claim Against Defendant Henry Morgenthau, Jr.,
Secretary of the Treasury*

35. Intervener repeats each and every allegation contained in paragraphs 5 to 25, inclusive, of this answer, as if here set forth in full.

36. By reason of the foregoing, it thereupon became the ministerial duty of the Secretary of the Treasury to pay on account of said awards such sums as were available therefor from said German Special Deposit Account.

37. Defendant Secretary of the Treasury has nevertheless failed and refused to make any payments on account of said awards, solely by reason of the pendency of this action.

Wherefore, Intervener prays for judgment dismissing the complaint herein, with costs and disbursements, and for judgment in its favor upon its cross-claim, requiring the Secretary of the Treasury to pay to Intervener and to all other holders of awards by the Mixed Claims Commission granted pursuant to the decisions of said Commission dated June 15, 1939 and October 30, 1939, who have filed applications therefor, the amounts payable in respect of said awards out of the German Special Deposit Account, and granting Intervener and said other award holders such other and further relief as to the Court may seem just and proper.

RICHARD H. WILMER,
Attorney for Intervener,
Transportation Building,
Washington, D. C.

WILLIAM D. MITCHELL,
New York, N. Y.
Of Counsel.

35

Exhibit I

Mixed Claims Commission, United States and Germany

Docket Nos. 8103, 8117, et al.

Decision of the Commission Rendered by the Umpire
December 15, 1933

36

Mixed Claims Commission, United States and
Germany

Docket Nos. 8103, 8117, et al.

UNITED STATES OF AMERICA on behalf of Lehigh Valley Rail-
road Company, Agency of Canadian Car and Foundry
Company, Limited, and Various Underwriters, *Claim-*
ants,

v.

GERMANY.

Decision of the Commission

The national Commissioners are in disagreement upon certain questions arising in these cases. These questions will best be understood by a brief statement concerning the history of the proceedings.

The memorials were filed by the American Agent in the Black Tom case on March 16, 1927, and in the Kingsland case on March 26, 1927. The answers of Germany were filed on December 14, 1927, and January 17, 1928, respectively. Both Governments assembled evidence before and after the filing of the memorials. With considerable further evidence presented after the premature argument of April 3-12, 1929, the cases of the respective Governments again appeared to be completed so that submission and oral argument could be had in April, 1930. It then developed that some evidence had recently been elicited on behalf of the United States which made it certain that both Governments would wish to file additional evidence, so the hearing was by agreement adjourned to September 18, 1930, and both Governments submitted their cases at The

Hague September 18-30, 1930, on the record as then made. The Commission reached its decision dismissing both cases on October 16 and communicated it to the two Governments on November 13, 1930.

On January 12 and 22, 1931, the American Agent filed petitions for rehearing and reconsideration, which assigned as reasons for the requested action that the Commission had misapprehended the facts and committed errors of law. These petitions were considered and dismissed by the Commission in an opinion of March 30, 1931. On the same date the Commission addressed a letter to the two Agents in which it said:

In the decision handed down today in the Sabotage Cases the Commission has decided the matter of rehearings in these cases so far as the rehearing petitions therein are based on allegations of obvious error. This decision is related to the record as it stood when the cases were decided, and the decision reserves the question of the proposed admission of new evidence, which is a separate question.

37

The Commission asks me to advise you that it desires the two Agents, without waiting for the presentation of any additional new evidence, to submit briefs discussing, first, the jurisdictional considerations and legal principles which should govern the Commission's decision as to the admission of new evidence in these cases, and, second, what kind of new evidence, if any, should be admitted.

The Commission in this connection points out that the two Agents have already presented some argument on the question of new evidence and each Agent has based his argument in part on the decision of the Commission in the Philadelphia-Girard National Bank case. To avoid further discussion as to the proper interpretation of the language used by the Commission in that case we think it best to advise you that the National Commissioners are agreed that it was the intention of the Commission in that decision to rule against the introduction of further evidence of any kind after the evidence had once been closed and a decision promulgated. This ruling is not irrevocable, but it is desirable that argument addressed to the question should be devoted not to the interpretation of that language but

to the principle itself. The Commission has not seen the new evidence offered by the American Agent in the Sabotage Cases, but the descriptions of this evidence in his motions filed March 5 and 11, 1931, give the impression that the evidence offered is not new and is not of the character which courts admit after a decision is once made in cases where, after a decision, they admit any new evidence.

The Commission accordingly requests that the Agents file their briefs on the points above mentioned within two weeks, with leave to each Agent to file a reply brief within one week after the receipt of the other Agent's brief.

Pursuant to this letter briefs on the question of the Commission's power to reopen and rehear were filed April 27, 1931. Reply briefs were not filed; for reasons not necessary to state here. On July 1, 1931, the American Agent presented a supplementary petition for rehearing covering both cases, on the ground of newly-discovered evidence, and in it set forth that he had procured much additional evidence, some of which had been filed and the balance of which was being filed with the petition. The German Agent offered no evidence (he tendered none from the time of the Hague argument until January 9, 1932). A hearing was held at Boston July 30-August 1, 1931. The Commission did not pass upon its power to reopen and rehear the cases at that time, but reserved that question until it should have opportunity to examine the new evidence filed. The Commission then stated that perhaps it would need the assistance of an impartial expert to be retained by it to assist it in appraising certain of the documentary evidence filed by the American Agent. This matter was under advisement for some time, and on October 14, 1931, the Umpire, with the concurrence of the Commissioners, forwarded a joint letter to the two Agents stating as follows:

It has proved impossible to carry out the American Agent's suggestion that Mr. Osborn be employed by the Commission. Mr. Osborn himself is unwilling; the American Agent now objects; the German Agent's consent is subject to restrictions, and the Commission could not accept restrictions. The Commission has now decided not to make further search for a satisfactory expert. In view of Mr. Osborn's standing in his profession, we would welcome the presentation of his testimony if

the German Agent himself desires to offer it. The Commission still reserves its decision as to its right to admit new evidence in these cases.

Pursuant to this letter the German Agent on January 9, 1932, filed an affidavit by A. S. Osborn with certain annexes and over a period from January 9 to August 15-29, 1932, filed additional annexes to Osborn's affidavit.

The present Umpire was appointed to fill the vacancy, caused by Mr. Boyden's death, on March 24, 1932, and on April 8, 1932, a session of the Commission was held in order to bring the matter to a head and end the existing confusion. Pursuant to the agreement of the two national Agents an order was entered to the effect that the American Agent should conclude the filing of his evidence in support of his supplementary petition on or before June 1, 1932, and the German Agent file any evidence he cared to present in reply on or before August 15, that briefs should be exchanged and filed on or before September 15, and that the matter should be argued beginning November 1, 1932. The American Agent reserved no right to file reply evidence to that presented by the German Agent but he did assemble reply evidence, and, in order to give him additional time for its presentation, he was allowed until November 15 and the hearing was adjourned to November 21. Permission was also given to both Agents to file briefs not later than the close of the argument. It will be observed that during the entire period from March 30, 1931, to November 21, 1932, what had occurred was subject to the decision of the question of the Commission's jurisdiction to reopen the cases.

By mutual consent the hearing of November 21-25, 1932, was without prejudice to Germany's objection to the Commission's jurisdiction, all agreeing that if the new evidence filed would not change the result reached in the decision of October 16, 1930, the jurisdictional question need not be answered. The national Commissioners disagreed as to the effect of the new evidence, and the question of its effect therefore came to the Umpire for decision. He rendered the decision of the Commission of December 3, 1932, holding the new evidence not sufficient to change the original findings and dismissing the petitions for rehearing.

The matter had gotten into such shape that the method of procedure adopted seemed the only practicable one. It was at best an unsatisfactory method, and—without meaning any criticism of anyone—I am convinced, as the matter is now viewed in retrospect, it would have been fairer to both the parties definitely to pass in the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing, as requested on May 27, 1931, by the American Agent. The reception or rejection of the new evidence would have been a consequence of the decision of that question. As will be seen from the decision of December 3, 1932, Germany insisted upon its objection to the jurisdiction of the Commission to rehear, and the United States asserted that the Commission had such jurisdiction. The German Commissioner reserved
39 the question in the certificate of disagreement upon which the Umpire's functioning was grounded.

On May 4, 1933, a single petition was filed by the American Agent (signed by four firms of private counsel for claimants and countersigned by the American Agent) for a rehearing of both cases, which averred (1) "That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants", (2) "That there are certain witnesses within the territorial jurisdiction of the United States" some of whom are specifically named in the petition, "who have knowledge of facts and can give evidence adequate to convince the Commission of the liability of Germany for the destruction of the Black Tom Terminal and the Kingsland plant, but whose testimony cannot be obtained without authority to issue subpoenas and to subject such witnesses to penalties for failure to testify fully and truthfully", (3) that evidence can be produced "to show that the Commission has been misled by the German evidence", (4) "That there has also come to light evidence of collusion between certain German and American witnesses of a most serious nature to defeat these claims."

This petition was filed with the proper officers of the Commission, but no action has been taken upon it.

In May, 1933, the Umpire was apprised of the disagreement of the American and German Commissioners with respect to the power of the Commission to entertain the application. The German Commissioner by letter of May 5, 1933, addressed to the Umpire, enclosing a copy of his letter to the American Commissioner of even date and a copy of his opinion on the question of reopening, brought the situation to the attention of the Umpire. The German Commissioner's letter is as follows:

Hamburg, May 5th 1933.

My dear Mr. Justice,

I beg to hand you herewith a copy of a letter I wrote to Mr. Anderson and also a copy of an opinion I wrote on the question whether or not our Commission has the right to reopen a case.

Though from a strictly formal point of view you, as our Umpire, are not interested in the question but after it has been certified to you by the two National Commissioners, I feel it is my duty to keep you informed on what is going on, since I am afraid that Mr. Anderson and I might not agree on the issue.

I remain, my dear Mr. Justice,

very sincerely yours,
[Signed] W. Kiesselbach.

Justice Owen J. Roberts,
United States Supreme Court,
Washington, D. C.

His letter to the American Commissioner appears in the minutes of the Commission's meeting of October 31, 1933, and his opinion enclosed therewith and the American Commissioner's opinion are embodied in the American Commissioner's certificate of disagreement handed to the Umpire at that meeting. An additional opinion of the German Commissioner was filed on November 22 and a supplemental opinion of the American Commissioner on November 27.

The foregoing statement will serve to disclose the nature of the points upon which the Commissioners are in disagreement. A preliminary question of procedure arises which must also be decided. It may be stated as follows: May the Umpire, in the absence of a joint certificate submit-

ting that question to the Umpire, decide a question as to which the two national Commissioners are in disagreement? If this preliminary question be answered in the affirmative, then two others of substance remain for decision, as follows:

Has the Commission the power to pass upon the extent of its own jurisdiction?

If it has, then does this jurisdiction extend to the reopening of a case, once decided, by reason of after-discovered evidence, or disclosure that testimony offered was fraudulent, or a showing of collusion between witnesses for the two Governments, and that, in consequence, the Commission was misled by the record as made at the time of its decision?

Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence, since the right to tender such evidence is involved in the decision. The American Agent has, as I am advised, filed a very large quantity of evidence, which, in view of the questions of power now mooted, I have thought it improper to examine or to treat as forming part of the record in the cases.

Addressing myself to the preliminary question of procedure, I conclude that the disagreement of the national Commissioners is before me in such manner as to make it my duty, under the Agreement of August 10, 1922, between the two Governments, to take cognizance of the disagreement and decide the questions involved. The Agreement provides, in Article II, "The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings." The duty of the Umpire under the plain terms of the document arises automatically upon a disagreement between the Commissioners and his being apprised thereof. Under the Agreement no formal act is required to bring into operation the authority thus vested in the Umpire. Rule VIII (a), entered February 14, 1924 (amending that rule as originally enacted on November 15, 1922), reads: "The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any

point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified." But rules adopted by the Commission as a matter of its own convenience and for the guidance of the national
 41 Agents can not contravene the explicit terms of the instrument which created the Commission. This brings me to the questions of substance.

May the Commission pass upon its own jurisdiction?

The Agrément of the two Governments created the Commission to deal with three classes of claims specified in Article I arising by reason of obligations undertaken by Germany under the Treaty of Berlin of August 25, 1921. While at the date of the execution of the Agreement, August 10, 1922, it was known that such claims would be numerous and amount in the total to a huge sum, the nature and the validity of the separate claims which might be submitted were unknown. It was for the purpose of passing upon these claims, both as to validity and amount, that the Commission was created. At the very threshold the tribunal might encounter in each case the question whether the claim presented fell within the categories of those to be adjudicated or was outside the scope of the Treaty and the Agreement. In this aspect the Commission was bound to determine its own jurisdiction, and for that purpose to interpret and apply the terms of the Agreement which created it.

A decision that it had jurisdiction of a claim was by the very terms of the Agreement to be accepted by both Governments as final and binding upon them (Article VI). The Agreement submits the questions for decision as between the two Governments to the Commission. What those questions are must be determined within the four corners of the instrument. It is not within the competency of either Government to retract the authority which it conferred upon the Commission. If that body may not from the terms of the Agrément ascertain what power was conferred, it would be wholly incompetent to act except in an advisory capacity, and none of its decisions could in the nature of the case be accepted as final and binding by the

Governments, as the Agreement states they shall be. How the Commission shall proceed with its task, the form of pleading to be adopted, the manner of hearing (subject to what is hereafter stated in respect of Article VI), the form and entry of its decisions, its control over a case after a decision is rendered, are all left to its determination and regulation.

The Agreement is to be read in the light of its language and its purpose; and where it is silent, the powers and duties of the Commission are to be determined according to the nature of the function entrusted to it. I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it. Any other view would lead to the most absurd results—results which obviously the two Governments did not intend.

This brings me to the second question of substance.

Has the Commission the power to reopen a case upon the showing made by the pending petition?

The answer to this question must also be found in the terms of the Agreement creating the Commission. On the one hand it is pointed out that the preamble refers to the desire of the parties that "the amount to be paid by Germany in satisfaction of Germany's financial obligations

42 " * * * be determined. The fact that "amount" is singular rather than plural and while various claims of American citizens and the Government are involved, in the ultimate Germany is to pay a total ascertained by the addition of all the claims allowed, is said to make the Commission the arbiter of a single suit or action consisting of thousands of counts, each count representing the claim of an American national or of the Government of the United States. It is insisted that the Commission is limited by few covenants, rules, or directions to be found in the Agreement, that it may proceed practically as it sees fit to accomplish the task committed to it, that its only concern is justice and equity as between the Nations signatory to the Agreement, and that if in justice and equity it should rehear a case nothing in the Agreement or in the constitution of the Commission stands in the way. The argument is that in effect the tribunal sits without terms or sessions as a continuing tribunal, trying a single case, and its doors

are never closed to the litigants before it until it shall have completed this task and formally disbanded.

On the other hand it is contended that each of the claims presented constitutes a case within the meaning of the Agreement; that each is initiated by a petition or memorial to which an answer is filed, thus making up an issue for trial; that it was intended, when the Commission reached a decision in any such case, the decision should be final and binding upon the parties; that the Commission is without power, once it has rendered its decision in a case, to reopen or rehear it for any reason.

I think these positions are both extreme and that neither represents the true construction of the Agreement or an accurate definition of the Commission's powers.

I am not persuaded that the use of the word "amount" in the preamble makes the Commission a tribunal to try a single action divided into counts. There is much to indicate that, while the total of the awards is to be taken to make up the amount due by Germany, the claims presented are to be treated as individual cases. Thus in Article II, where reference is made to the selection of the Umpire, his function is amongst other things specified as "to decide upon *any cases* concerning which the commissioners may disagree, * * *". And cases are in this sentence distinguished from questions. Article IV provides that "The commissioners shall keep an accurate record of the questions *and cases* submitted * * *". The uniform practice of the Commission indicates this understanding of its function, for each claim has been treated as initiating a separate case and has eventuated in a separate decision (a decision of it as a separate case: even though, as a convenience the Commission in one document frequently dismissed a number of claims and less frequently rendered awards in a number of cases, each received the same treatment as if the decision thereof had been expressed in a record devoted to it alone). On the part of the United States this method of dealing with the claims has been recognized in the Settlement of War Claims Act of 1928 where provision is made for the certification to the Treasury of the awards of the Commission as they are made upon individual claims.

My view is that the Commission is a tribunal sitting continuously with all the attributes and functions of a
43 continuing tribunal until its work shall have been closed; and that as such tribunal it is engaged in the trial and adjudication of a large number of separate and individual cases.

The German Government would have me draw from these premises the ultimate conclusion that the Commission is without power to reopen any case in which it has made a decision, and in support of this view refers to the last paragraph of Article VI, which provides "The decisions of the commission and those of the umpire (in case there may be any) *shall be accepted* as final and binding upon the two Governments." This paragraph, in my judgment, furnishes no aid to the German argument. It is a covenant as between the two Nations binding each of them with respect to any decisions which may be made. But it is to be observed that neither this paragraph nor any other provision of the agreement purports to define what is or what shall be considered a "decision of the commission". It is left to the Commission to determine when its decision upon any claim is final. It has no concern with the action taken in consequence of its awards. It is a matter for the two sovereigns to carry out their agreement that they shall accept the decisions as final and binding. If a decision should be revised by the Commission as a result of a rehearing and a new decision reached in a particular case, the Commission would have no concern with the adjustment of the settlement consequent upon its action. A court may often render a judgment which, by reason of what has occurred, it is not possible to execute in accordance with its terms, but the mere fact that the judgment may be incapable of execution in part or in whole in no way alters the jurisdiction of the tribunal or indeed its duty to render such judgment as to justice and right may appertain.

With this preliminary general statement as to the jurisdiction of the Commission, I address myself to a determination of its power to reopen a case in which it has rendered a decision.

1. I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or

where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules. My understanding is that the Commission has repeatedly done so where there was palpable error in its decisions. It is said on behalf of Germany that this has never been done except where the two Agents agreed that such course under the circumstances was proper. And the argument is drawn from this fact that the Commission is without power to take such action of its own motion or in the face of opposition by either Agent. I can not follow this argument.

If the Commission's decisions once made are final and the body wholly without power to reopen them, then a case once decided can only be reopened by a formal agreement of the two Governments amending the Agreement
44 under which the Commission sits, for no additional power can be conferred upon the tribunal except by the parties who called it into being and gave whatever jurisdiction it originally possessed. If, therefore, a case may be reopened by consent, the same action may be taken without consent. The first petition for reopening and rehearing filed in these cases by the American Agent was based on grounds such as are above described. I have no doubt that the Commission had power to consider that petition and to deal with the case in the light of the matters it brought forward.

2. I come now to the question of jurisdiction to reopen for the presentation of what is usually known in judicial procedure as afterdiscovered evidence. I am of opinion that the Commission has no such power.

In cases where a retrial is granted or a reopening and rehearing indulged for the submission of so-called after-discovered evidence, this is usually by a court. It is to the interest of the public that litigation be terminated, and municipal tribunals have the power to set a case for trial and to compel the parties to proceed. While they will not compel a litigant to proceed without hearing his reasons for delay, neither party has a right to hold the case open until he feels that he has exhausted all possible means of obtain-

ing evidence. If such right existed, courts would be unable to function. By analogy, if this Commission had the power to make an order to close the proofs in any case and compel the parties to proceed, either party who was not then ready, because it had not exhausted its sources of information and evidence, might well have an equity to ask a reopening that it might be permitted to offer evidence theretofore unavailable.

But the situation here is quite otherwise. Article VI, second paragraph, provides: "The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim." All must admit the parties intended the Commission should not sit indefinitely but should expeditiously complete its work. The agreement provides that all claims to be considered must be brought to the Commission's attention within six months of its first session. But, on the other hand, no time limit whatever was set in the original Agreement for the closing of proofs. In contradistinction, such a mandatory provision for closing proofs was embodied in the supplementary Agreement of December 31, 1928, as to claims embraced within the scope of that instrument.

The Commission has from its inception been sensible of its lack of power to compel the closing of the record and the final submission of any case. While it has urged the Agents to complete their records and to submit and argue their cases upon such completion and has sought the cooperation of the Agents to bring the cases to final submission, it has never, as I am advised, entered an order for the final closing of the record in any case without consent or over objection. I do not think it has power so to do. The clause quoted from Article VI compels the reception of any written statement or document presented by either party.

45 As I read this provision, so long as either party is of opinion that written statements or documents are or may be available in support of its contention it may of right demand that the Commission await the filing thereof before final submission of the cause. The American Agent was under no obligation to close his record and submit his case at The Hague if he knew, or had reason to expect, that further evidence was obtainable.

It is suggested in the petition for reopening that the United States was unable to obtain the evidence from certain witnesses without the power to compel their testimony. This fact was as obvious in the autumn of 1930 as it is today. The German Government availed itself of its ordinance of June 28, 1923, which permitted the summoning of witnesses, placing them under oath, examining them before a court, and rendering them liable to penalty for false-swearing. No reason is apparent why a similiar statute could not at any time have been adopted in the United States. The best evidence that it could is that when the American Agent and the Department of State requested the passage of such a law it was promptly enacted and has been availed of in obtaining evidence now proffered (Act of June 7, 1933). The lack of an instrument which would have been ready to hand if requested can not excuse the failure to obtain the testimony thereby obtainable.

The agreement does not contemplate that when the two Agents signify their readiness to submit a case and do submit it upon the record as then made to their satisfaction, obtain a hearing and decision thereon, the Commission shall have power to permit either Agent to add evidence to the record and to reconsider the case upon a new record thus made.

3. The petition now under consideration presents, in the main, a situation different from either of those above discussed. Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimants' cases; that certain witnesses, including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision was erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof; postponing for the

consideration of the Commission the probative value of the evidence tendered.

The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them.

46 The Commission is not functus officio. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, a fortiori it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.

Done at Washington December 15, 1933.

OWEN J. ROBERTS,
Umpire.

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Exhibit II

Before the Mixed Claims Commission

United States and Germany

Docket Nos. 8103, 8117, et al.

UNITED STATES OF AMERICA on behalf of LEHIGH VALLEY
RAILROAD COMPANY, CANADIAN CAR AND FOUNDRY COM-
PANY, ET AL.

VS.

GERMANY

Decision of the Commission Rendered by the Umpire.

1. Within the meaning and intent of the agreement by which the Commission was constituted and its powers defined, there exists a disagreement between the two national

commissioners. As I participated with them in the conferences after submission of the cases, I am cognizant of the disagreement, which makes it my duty to act in the decision of the cases. If more were needed, I have before me the certificate and opinion of the American Commissioner. Accordingly I report by opinion as Umpire.

2. I concur in the views expressed by the American Commissioner to the effect that the withdrawal of the German Commissioner, after submission by the parties, and after the tribunal, having taken the cases under advisement, pursuant to its rules, was engaged in the task of deciding the issues presented, did not oust the jurisdiction of the Commission. The full discussion of this matter by the American Commissioner renders it unnecessary for me to do more than to express my agreement with his reasoning and his conclusions. I hold that the Commission as now constituted has jurisdiction to decide the pending motions.

3. The decision filed at Washington in 1932 having been set aside, the cases are now before the Commission on the motion of the American Agent to set aside the decision on the merits, rendered as the result of the submission at the Hague in 1930 and to grant a rehearing on the whole record, comprising the proofs offered before and after the Hague decision. The grounds of this motion sufficiently appear from prior decisions of the Commission.

4. As set forth in the American Commissioner's opinion, he and the Umpire agreed in the conclusion that the motion should be granted because the United States had proved its allegation that fraud in the evidence presented by Germany misled the Commissioner and affected its decision in favor of Germany. The German Commissioner was apprised of this conclusion before he withdrew from the deliberations of the Commission. He insisted, nevertheless, that before the motion should be granted, the Commission should examine the proofs tendered by the United States to determine whether the claims had been made good. This was on the ground that, though the Commission had been misled by false and fraudulent testimony, that fact would be immaterial if, as an independent consideration, the United States had in its own cases failed to sustain the burden of proof incumbent upon it. The American Commissioner and the Umpire thereupon agreed to go beyond what they

thought the necessary function of the Commission in the circumstances and proceed to canvass with the German Commissioner the cases as made by the United States. During the course of this investigation the German Commissioner withdrew.

5. Much evidence has been submitted since the decision of 1932 which corroborates the testimony of Herrmann and Hilken and weakens the attacks on their credibility. This is examined, analyzed and compared with the record as it stood when the case was submitted at the Hague, in the opinion of the American Commissioner, and no purpose would be served by restatement of the same matters in this opinion. In my view the statements of Wozniak to Department of Justice agents and to the Bureau of Naturalization; the testimony of Herrmann, Hilken, Wozniak, Ahrendt, Thorne, and Hilken, Sr., taken in open court, under the statute; and the material drawn from the files of the Eastern Forwarding Company, and the evidence as to the so-called Lyndhurst testimony, is persuasive that the Commission was seriously misled to the conclusion it reached upon the submission at the Hague.

6. All of the above tends to strengthen the cases of the United States. As is admitted, the Herrmann message, if genuine, establishes Germany's responsibility in both cases. In the decision of 1932 the Commission was unable to make an affirmative finding of the authenticity of the message. A large body of evidence has since been introduced addressed to the considerations which caused the Commission to withhold such a finding. This is examined and discussed at length in the opinion of the American Commissioner, and there is no need to add to what he had said. The circumstances of the production of the document to the claimants and the incidents of its transmission and delivery to Hilken have been cleared up. The Qualters story has been completely discredited, and its demolition involves serious implications concerning Germany's defense. The views formerly held respecting the expert evidence must be revised in the light of the evidence of Osborn and the letters and documents exhibiting his activities and attitude. Further argument and extended study of the contents of the message, and of Hinsch's and Siegel's testimony, and comparison with the record as it stood prior to the Hague ar-

gument, tends to negative the adverse conclusions heretofore drawn from the references to current and past events and to persons and places contained in the message. I agree with the American Commissioner that on the evidence now before the Commission the decision must be in favor of the authenticity of the message.

7. I find that, for the reason alleged by the United States in its petitions for rehearing,—material fraud in the proofs presented by Germany, and for the further reason that on the record as it now stands the claimants' cases are made out, the pending motions should be and they are granted.

(signed) OWEN J. ROBERTS
Umpire.

Done at Washington
June 15, 1939.

EXHIBIT III

63

AWARDS GRANTED BY
MIXED CLAIMS COMMISSION
TO SABOTAGE CLAIMANTS

October 30, 1939

Award Holder	Docket No.	Principal Amount of Award	Interest Date
Aetna Insurance Co.	8371	\$ 51,810.55	Dec. 31, 1916
		467.70	June 1, 1917
		1,927.22*	
	8231	\$ 54,205.47	
		26,766.78	Mar. 10, 1917
		12,791.00	Mar. 28, 1917
		4,171.77	June 23, 1917
		110.40	Aug. 6, 1917
		\$ 43,839.95	
Agency of Canadian Car & Foundry Co.	8117	5,871,105.20	Jan. 31, 1917
Agricultural Insurance Co.	8372	12,470.13	Dec. 31, 1916
		7,483.83	June 1, 1917
		845.04*	
	8232	\$ 20,799.00	
		616.25	Mar. 28, 1917
Allemannia Fire Insurance Co.	8373	8,365.90	Dec. 31, 1916
		355.99*	
		\$ 8,721.89	
Alliance Insurance Co.	8374	280.62	June 1, 1917
		5.87*	
	8233	\$ 286.49	
		924.58	Mar. 28, 1917
American Alliance Insurance Co.	8397	374.16	June 1, 1917
		7.83*	
	8234	\$ 381.99	
		1,232.50	Mar. 28, 1917
American & Foreign Insurance Co.	8235	13,768.69	June 23, 1917
American Central Insurance Co.	8375	5,466.41	June 1, 1917
		224.52*	
		\$ 5,690.93	
	8236	1,232.50	Mar. 28, 1917

*No interest.

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
American Eagle Fire Ins. Co.	8376	14,358.55 601.61*	Dec. 31, 1916
		\$ 14,958.16	
American Ins. Co.	8377	9,334.13 374.16 405.02*	Dec. 31, 1916 June 1, 1917
		10,113.31	
	8237	1,232.50	Mar. 28, 1917
Automobile Ins. Co. of Hartford	8378	187.07 3.91*	June 1, 1917
		\$ 190.98	
	8238	616.25 10,031.25	Mar. 28, 1917 Apr. 30, 1917
		\$ 10,647.50	
Baltimore-American Ins. Co., suc- cessor to Peoples National Fire Ins. Co.	8432	24,283.51 374.16 1,041.16*	Dec. 31, 1916 June 1, 1917
		\$ 25,698.83	
Bethlehem Steel Co.	14901	\$1,896,491.18 & int. at 5% on \$850,412.51 from to	July 30, 1916 July 30, 1916 May 28, 1920
Boston Insurance Co.	8379	75,833.77 374.16 1,557.24*	Dec. 31, 1916 June 1, 1917
		\$ 77,765.17	
	8362	5,166.42	Mar. 28, 1917
Buffalo Ins. Co.	8380	5,670.82 241.31*	Dec. 31, 1916
		\$ 5,912.13	
California Ins. Co.	8381	2,287.04	June 1, 1917
Camden Fire Ins. Association	8382	7,822.17 374.16 340.69*	Dec. 31, 1916 June 1, 1917
		\$ 8,537.02	
	8239	1,232.50 12,037.50	Mar. 28, 1917 May 15, 1917
		\$ 13,270.00	

*No interest

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
Capital Fire Ins. Co.	8383	249.15 1,728.97 84.18*	Dec. 31, 1916 June 1, 1917
		\$ 2,062.30	
Central Manufacturers Ins. Co., successor to Ohio Millers Mu- tual Fire Ins. Co.	8275	54,450.00	Mar. 28, 1917
City of New York Insurance Co.	8385	1,628.06 69.28*	Dec. 31, 1916
		\$ 1,697.34	
Columbia Ins. Co.	8242	1,258.85	Mar. 28, 1917
Commercial National Fire Ins. Co. by Central Trust Co. of Ill., Receiver	8240	2,500.00	Mar. 13, 1917
Commercial Union Fire Ins. Co. of New York	8387	2,474.11 3.91*	June 1, 1917
		\$ 2,478.02	
	8244	616.25	Mar. 28, 1917
Commonwealth Ins. Co. of New York	8388	44,625.39 9,724.79 2,339.02*	Dec. 31, 1916 June 1, 1917
		\$ 56,689.20	
	8245	22,562.50 1,232.50	Mar. 10, 1917 Mar. 28, 1917
		\$ 23,795.00	
Continental Ins. Co.	8389	18,324.03 768.08*	Dec. 31, 1916
		\$ 19,092.11	
	8246	6,666.40	Mar. 9, 1917
County Fire Ins. Co. of Phila.	8390	187.08 8.91*	June 1, 1917
		\$ 190.99	
	8247	616.25	Mar. 28, 1917

*No interest.

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
Currey, Mary Leyden	8467	20,000.00	Nov. 1, 1923
Leyden, Jr., Cornelius J.		12,000.00	Nov. 1, 1923
Leyden, John		14,000.00	Nov. 1, 1923
Leyden, Francis B.		14,000.00	Nov. 1, 1923
		\$ 60,000.00	
Delaware, Lackawanna & Western Railroad Co.	8296	32,676.62	Jan. 11, 1917
Equitable Fire & Marine Ins. Co.	8391	187.07	June 1, 1917
		3.91*	
		\$ 190.98	
	8248	616.25	Mar. 28, 1917
Federal Ins. Co.	8249	10,150.33	June 22, 1917
		339.80	Aug. 2, 1917
		\$ 10,490.13	
Fidelity Phenix Ins. Co.	8392	17,846.67	Dec. 31, 1916
		747.76*	
		\$ 18,594.43	
	8250	6,687.20	Mar. 8, 1917
Fire Association of Philadelphia	8393	63,731.32	Dec. 31, 1916
		561.24	June 1, 1917
		2,723.68*	
		\$ 67,016.24	
	8251	6,687.50	Mar. 9, 1917
		2,465.00	Mar. 28, 1917
		\$ 9,152.50	
Firemen's Fund Ins. Co.	8394	2,639.50	Dec. 31, 1916
		467.79	June 1, 1917
		123.38*	
		\$ 3,260.58	
	8252	6,687.50	Mar. 14, 1917
		1,540.62	Mar. 28, 1917
		14,237.35	July 14, 1917
		186.80	Sept. 18, 1917
		\$ 22,651.77	
Firemen's Ins. Co.	8395	30,319.56	Dec. 31, 1916
		1,290.17*	
		\$ 31,609.67	
Franklin Fire Ins. Co.	8396	2,483.04	Dec. 31, 1916
		187.08	June 1, 1917
		109.57*	
	8253	616.25	Mar. 28, 1917
		\$ 2,779.69	

*No interest.

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Award Holder	Docket No.	Principal Amount of Awards	Interest Date
Glens Falls Ins. Co.	8398	33,890.91	Dec. 31, 1916
		187.07	June 1, 1917
		1,446.06*	
		\$ 35,524.04	
	8254	616.25	Mar. 28, 1917
		7,816.52	July 13, 1917
		\$ 8,432.77	
Globe & Rutgers Fire Insurance Co.	8399	47,388.77	Dec. 31, 1916
		2,002.58*	
		\$ 49,391.35	
	8255	10,422.50	July 18, 1917
		293,500.00	Oct. 27, 1917
		74,825.00	Oct. 31, 1917
		62,500.00	Nov. 10, 1917
		\$ 441,247.50	
Granite State Fire Ins. Co.	8400	35,873.61	Dec. 31, 1916
		280.62	June 1, 1917
		1,532.39*	
		\$ 37,686.62	
	8256	924.38	Mar. 28, 1917
Great American Ins. Co.	8401	16,579.44	Dec. 31, 1916
		561.24	June 1, 1917
		717.25*	
		\$ 17,857.93	
	8439	374.16	June 1, 1917
		7.88*	
		\$ 381.99	
Hanover Fire Ins. Co.	8257	3,081.25	Mar. 28, 1917
	8402	60,215.30	Dec. 31, 1916
		187.08	June 1, 1917
		31.38*	
		\$ 60,433.76	
Hartford Fire Ins. Co.	8258	616.25	Mar. 28, 1917
	8403	74,380.44	Dec. 31, 1916
		187.07	June 1, 1917
		3,168.99*	
		\$ 77,736.50	
	8422	3,768.66	Dec. 31, 1916
		187.07	June 1, 1917
		164.29*	
		\$ 4,120.02	

*No interest.

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
	8259	32,700.00	Mar. 8, 1917
		40,812.50	Mar. 14, 1917
		1,232.50	Mar. 28, 1917
		<hr/> \$ 74,745.00	
Hartford Fire Ins. Co., successor to Citizens Ins. Co. of Missouri	8384	187.08	June 1, 1917 *
		8.91*	
		<hr/> \$ 190.99	
	8241	616.25	Mar. 28, 1917
Home Insurance Co.	8404	272,679.79	Dec. 31, 1916
		561.24	June 1, 1917
		5,597.59*	
		<hr/> \$ 278,838.62	
	8450	8,160.73	Dec. 31, 1916
	8260	11,743.45	Mar. 26, 1917
		1,848.75	Mar. 28, 1917
		4,573.08	Mar. 30, 1917
		31,267.21	June 21, 1917
		<hr/> \$ 49,432.49	
Imperial Assurance Co.	8405	2,146.45	June 1, 1917
		91.34*	
		<hr/> \$ 2,237.79	
Insurance Company of North America	8406	74,838.61	Dec. 31, 1916
		374.16	June 1, 1917
		3,064.75*	
		<hr/> \$ 78,277.52	
	8493	5,750.54	Dec. 31, 1916
		244.70*	
		<hr/> \$ 5,995.24	
	8262	1,848.75	Mar. 28, 1917
		45,393.59	Apr. 2, 1917
		26,056.20	June 21, 1917
		169.95	July 26, 1917
		<hr/> \$ 73,468.49	
Insurance Co. of State of Penna.	8407	20,424.00	Dec. 31, 1916
	8263	7,425.00	Mar. 30, 1917
International Ins. Co.	8408	6,658.04	June 1, 1917
		283.32*	
		<hr/> \$ 6,941.36	
	8264	15,000.00	Mar. 14, 1917
Knickerbocker Ins. Co.	8409	167.82	Dec. 31, 1916

*No interest.

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
Lumber Underwriters	8265	6,153.84	May 2, 1917
Lehigh Valley Railroad Co.	8103	9,900,322.77	Jan. 5, 1920
Massachusetts Fire & Marine Ins. Co.	8410	9,974.99 6,658.04 707.77*	Dec. 31, 1916 June 1, 1917
		\$ 17,340.80	
Mechanics & Traders Ins. Co.	8411	16,794.04 714.63*	Dec. 31, 1916
		\$ 17,508.67	
Mercantile Ins. Company	8412	61,665.65 5,432.24 2,847.10*	Dec. 31, 1916 June 1, 1917
		\$ 69,944.99	
	8266	23,406.25 1,232.50	Mar. 10, 1917 Mar. 28, 1917
		\$ 24,638.75	
Merchants Fire Assurance Corp. of N. Y.	8413	8,652.23 368.17*	Dec. 31, 1916
		\$ 9,020.40	
	8267	42,075.00 13,774.91	Mar. 12, 1917 Mar. 27, 1917
		\$ 55,849.91	
Millers National Ins. Co.	8414	12,702.06 4,517.02 732.72*	Dec. 31, 1916 June 1, 1917
		\$ 17,951.80	
Minneapolis Fire & Marine Ins. Co.	8415	16,986.88 722.84*	Dec. 31, 1916
		\$ 17,709.72	
Monarch Fire Ins. Co., successor to Columbian National Fire Ins. Co.	8386	67,178.58 2,858.62*	Dec. 31, 1916
		\$ 70,037.20	
	8243	10,000.00	Mar. 13, 1917
Mutual Fire, Marine & Inland Ins. Co.	8416	60,580.00	Dec. 31, 1916
National Fire Ins. Co. of Hartford	8417	100,904.31 1,697.16*	Dec. 31, 1916
		\$ 102,601.47	
	8268	8,190.09	Mar. 23, 1917

*No interest.

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
National Union Fire Ins. Co.	8418	2,148.46 91.42*	Dec. 31, 1916
		\$ 2,239.88	
	8289	4,950.00	Mar. 9, 1917
Newark Fire Ins. Co.	8419	33,265.32 187.08 1,419.44*	Dec. 31, 1916 June 1, 1917
		\$ 34,871.84	
	8270	616.25	Mar. 28, 1917
New Brunswick Fire Ins. Co.	8420	2,207.15 93.92*	June 1, 1917
		\$ 2,301.07	
New Hampshire Fire Ins. Co.	8421	16,624.99 280.62 713.31*	Dec. 31, 1916 June 1, 1917
		\$ 17,618.92	
	8271	924.38	Mar. 28, 1917
New York & Boston Lloyds	8272	4,950.00	Mar. 27, 1917
Niagara Fire Ins. Co.	8423	61,116.59 187.08 2,604.55*	Dec. 31, 1916 June 1, 1917
		\$ 63,908.25	
	8424	4,176.94 177.74*	Dec. 31, 1916
		\$ 4,354.68	
	8273	616.25	Mar. 28, 1917
Northern Ins. Co. of New York	8425	25,221.44 1,073.24*	Dec. 31, 1916
		\$ 26,294.68	
North River Ins. Co.	8426	108,718.63 4,361.94*	Dec. 31, 1916
		\$ 113,080.57	
	8274	60,885.00 3,891.93 8,250.00	Mar. 15, 1917 Mar. 22, 1917 Nov. 27, 1917
		\$ 73,026.93	

*No interest.

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
Ohio Farmers Ins. Co.	8427	16,605.85	Dec. 31, 1916
		5,518.51	June 1, 1917
		432.86*	
		\$ 22,557.02	
Ohio Valley Fire & Marine Ins. Co. by J. W. Jeffers, Receiver	8361	7,425.00	Apr. 5, 1917
Old Colony Ins. Co.	8428	374.16	June 1, 1917
		7.83*	
		\$ 381.99	
		8363 2,491.35	Mar. 28, 1917
Orient Ins. Co.	8429	28,995.12	Dec. 31, 1916
		137.08	June 1, 1917
		1,241.17*	
		\$ 30,423.37	
Pacific Fire Ins. Co.	8276	616.25	Mar. 28, 1917
		8430 155.68	Dec. 31, 1916
		6.62*	
		\$ 162.30	
The Pennsylvania Fire Insurance Co.	8431	70,649.48	Dec. 31, 1916
		374.16	June 1, 1917
		951.88*	
		\$ 71,975.52	
Phoenix Ins. Co.	8277	7,500.00	Mar. 13, 1917
		1,232.50	Mar. 28, 1917
		\$ 8,732.50	
		8434 4,724.66	Dec. 31, 1916
Providence Washington Ins. Co.	8435	187.07	June 1, 1917
		204.96*	
		\$ 5,116.69	
		8278 616.25	Mar. 28, 1917
Providence Washington Ins. Co.	8435	8,262.00	Dec. 31, 1916
		187.07	June 1, 1917
		355.48*	
		\$ 8,804.55	
Providence Washington Ins. Co.	8279	5,732.12	Mar. 13, 1917
		616.25	Mar. 28, 1917
		5,211.00	June 22, 1917
		\$ 11,559.37	

*No interest.

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
Queen Ins. Co.	8436	31,418.87	Dec. 31, 1916
		187.08	June 1, 1917
		1,340.87*	
		\$ 32,946.82	
	8280	616.25	Mar. 28, 1917
		13,028.67	June 22, 1917
		\$ 13,644.92	
Rhode Island Ins. Co.	8437	2,143.05	Dec. 31, 1916
		9,485.78	June 1, 1917
		494.84*	
		\$ 12,123.67	
	8281	4,950.00	Apr. 6, 1917
Richmond Ins. Co. of N. Y.	8438	268.53	Dec. 31, 1916
	8282	19,206.00	Mar. 15, 1917
		1,357.37	Mar. 22, 1917
		\$ 20,563.37	
Safeguard Ins. Co.	8441	4,294.07	June 1, 1917
		182.72*	
		\$ 4,476.79	
St. Paul Fire & Marine Ins. Co.	8440	187.07	June 1, 1917
		3.91*	
		\$ 190.98	
	8283	616.25	Mar. 28, 1917
Security Ins. Co.	8442	4,197.76	June 1, 1917
		172.56*	
		\$ 4,370.32	
	8284	924.38	Mar. 28, 1917
Springfield Fire & Marine Ins. Co.	8443	23,438.40	Dec. 31, 1916
		374.16	June 1, 1917
		1,005.20*	
		\$ 24,817.76	
	8285	1,232.50	Mar. 28, 1917
Standard Fire Ins. Co.	8444	187.08	June 1, 1917
		3.91*	
		\$ 190.99	
	8286	616.25	Mar. 28, 1917

*No interest.

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Award Holder	Docket No.	Principal Amount of Award	Interest Date
Stuyvesant Ins. Co.	8445	3,053.57 129.94*	Dec. 31, 1916
		\$ 3,183.51	
	8287	5,857.85	Mar. 28, 1917
Stuyvesant Ins. Co. as successor to Industrial Fire Ins. Co.	8261	12,375.00	Mar. 29, 1917
Underwriters at American Lloyds	8288	8,910.00	Mar. 27, 1917
Underwriters at Great Western Lloyds	8289	7,326.00	Mar. 27, 1917
Union Underwriters of New York	8290	7,524.00	Mar. 27, 1917
United States Fire Ins. Co. (with which is merged Williamsburgh City Fire Ins. Co.)	8446	19,504.23 81.80*	Dec. 31, 1916
		\$ 19,586.03	
	8449	43,813.31 1,864.37*	Dec. 31, 1916
		\$ 45,677.68	
	8291	23,265.60 1,459.47	Mar. 15, 1917 Mar. 22, 1917
		\$ 24,724.47	
	8292	32,175.00 1,459.47	Mar. 15, 1917 Mar. 22, 1917
		\$ 33,634.47	
United States Fire Ins. Co. (with which is merged Colonial Assurance Co.)	8293	4,950.00	Mar. 28, 1917
Virginia Fire & Marine Ins. Co.	8447	18,626.94 335.91 806.92*	Dec. 31, 1916 June 1, 1917
		\$ 19,769.77	
Westchester Fire Ins. Co.	8448	14,647.23 467.70 526.72*	Dec. 31, 1916 June 1, 1917
		\$ 15,641.65	
	8295	1,540.62	Mar. 28, 1917
Westchester Fire Ins. Co. as successor to U. S. Lloyds, Inc.	8294	33,460.00	June 21, 1917

*No interest.

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Order

Filed December 7, 1939

This matter came on to be heard the sixth day of December, 1939, upon the application of American-Hawaiian Steamship Company for leave to intervene, Fred K. Nielsen, Esq., appearing for the applicant for intervention, John F. Condon, Jr., Esq., appearing for the plaintiff, Z. & F. Assets Realization Corporation, Francis J. McNamara, Esq., appearing for the defendants, Cordell Hull, Secretary of State, and Henry Morgenthau, Jr., Secretary of Treasury, and William D. Mitchell, Esq., and Richard H. Wilner, Esq., appearing for intervener-defendant, Lehigh Valley Railroad Company, and a hearing having been held thereon,

61 IT IS ORDERED this 7th day of December, 1939, that American-Hawaiian Steamship Company be allowed to intervene and be, and it hereby is, made an additional party plaintiff on the following conditions:

1. That the answer of intervener-defendant, Lehigh Valley Railroad Company, shall be deemed amended so as to include as paragraph 27(a) thereof a statement that intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 2 and 10 of the Bill of Intervention of the American-Hawaiian Steamship Company except that it admits that the Mixed Claims Commission granted seven awards in favor of said Steamship Company aggregating a total principal amount of \$3,044,125.00, together with interest thereon from varying dates at 5% per annum, and that plaintiff has received on account of said awards the sum of \$3,309,906.69; and that said answer, as amended, shall stand as the answer of intervener-defendant to the Bill of Intervention of the intervener-plaintiff as well as its answer to the original complaint.

2. That the intervention of American-Hawaiian Steamship Company shall not in any way operate to cause any delay in the hearing of the pending motions for summary judgments.

At the same time there came on for hearing, with appearances as aforesaid, the question whether the pending

motions for summary judgments against the plaintiff and against the intervener-plaintiff should be heard on Monday, December 11, 1939, and counsel for plaintiff, Z. & F. Assets Realization Corporation, having stated that if the
 62 hearing of said motions be held on Thursday, December 14, 1939, he would file his affidavits and points and authorities in opposition thereto on Wednesday, December 13, 1939, and withdraw his pending motion entitled "Motion to Vacate Service of Papers on Motion by Intervenor for Summary Judgment", and counsel for Lehigh Valley Railroad Company having agreed to that course, and there being no objection by counsel for the defendants,
IT IS FURTHER ORDERED

1. That the hearing of the motions for summary judgments against the plaintiff and the intervener-plaintiff be held on Thursday, December 14, 1939, at 10 o'clock a. m., or as soon thereafter as counsel can be heard:

2. That the plaintiff and the intervener-plaintiff serve and file on Wednesday, December 13, 1939, their points and authorities and affidavits, if any, in opposition to the motions for summary judgments.

3. That the pending motion of plaintiff entitled "Motion to Vacate Service of Papers on Motion by Intervenor for Summary Judgment" be treated as withdrawn.

JAMES M. PROCTOR
Justice

December 7, 1939

63 [Intervener-Defendant's]
Motions for Summary Judgment

Filed November 30, 1939

Intervener-Defendant Lehigh Valley Railroad Company (hereinafter referred to as Intervenor), on its own behalf and on behalf of all other holders of awards by the Mixed Claims Commission granted pursuant to the decisions of said Commission dated June 15, 1939, and October 30, 1939, moves upon the pleadings herein and upon the affidavits of Harold H. Martin and John J. McCloy, both sworn to November 28, 1939, annexed hereto, and upon all the records, files and proceedings in this cause for summary judgment

in favor of Intervener dismissing the complaint, and, if the motion by American-Hawaiian Steamship Company, dated November 24, 1939, for leave to intervene should be granted, dismissing the Bill of intervention of said American-
64 Hawaiian Steamship Company, with costs, on the ground that there is no genuine issue as to any material fact and Intervener is entitled to such judgment as a matter of law.

Intervener, on its own behalf and on behalf of all other holders of awards by the Mixed Claims Commission granted pursuant to the decisions of said Commission dated June 15, 1939 and October 30, 1939 who have filed with defendant Secretary of the Treasury applications for payment thereof, separately moves upon the pleadings herein, and the affidavits of Harold H. Martin and John I. McCloy both sworn to November 28, 1939, annexed hereto, and upon all the records, files and proceedings in this cause for summary judgment upon Intervener's cross-claim, in favor of Intervener and against defendant Henry Morgenthau, Secretary of the Treasury, on the ground that there is no genuine issue as to any material fact and that Intervener is entitled to such judgment as a matter of law.

November 30, 1939.

RICHARD H. WILMER,
Attorney for Intervener-Defendant,
 Transportation Building,
 Washington, D. C.

WILLIAM D. MITCHELL,
 New York, N. Y.
Of Counsel.

65 *Affidavit of Harold H. Martin*

Filed November 30, 1939

Harold H. Martin, being duly sworn, deposes and says:
 I am Acting Agent of the United States before the Mixed Claims Commission, United States and Germany (hereinafter referred to as the Commission). On October 16, 1922, I was appointed by the Secretary of State as Counsel to the Agent of the United States before the Commission. On November 1, 1923, I was appointed Chief Counsel and

Assistant to the Agent of the United States and I have since continuously acted as and performed the duties of such Chief Counsel and Assistant to the Agent of the United States. On September 25, 1939, I was designated by the Secretary of State as Acting Agent of the United States before said Commission to fill the vacancy caused by the death of the Honorable Robert W. Bonyne, who continuously over a period of more than sixteen years until the time of his death was the Agent of the United States before said Commission.

As Counsel and Assistant to the Agent of the United States and as Acting Agent I have been continuously associated with the work of the Commission from its creation and I am familiar with the organization and records of the Commission, as well as the proceedings taken before it. I am also familiar with the organization, records and proceedings of the American Agency before said Commission. I have taken part in the disposal of over 20,000 claims notified to the Commission and am familiar with the treaties and agreements under which the Commission was created as well as the rules, regulations and customs under which it operated.

In connection with my duties as Counsel and Assistant to the Agent of the United States, I have assisted the Agent of the United States in the preparation of his reports to the Commission and to the Secretary of State and in his appearance before Committees of the Congress of the United States from time to time when he reported the progress of the work of the Commission. I also took part in conferences with officials of the Department of State and the Department of the Treasury relating to matters connected with the drafting and administration of the Settlement of War Claims Act of 1928 (45 Stat. 254) as amended, in which are contained provisions for the payment of awards of the Mixed Claims Commission. In performing said duties, I have become familiar with the administration of said Settlement of War Claims Act and particularly with the provisions which relate to the payment of awards of the Commission.

On July 2, 1921, the President of the United States approved a Joint Resolution of the Congress of the United States known generally as the Knox-Porter Resolution (42 Stat. 105, 106), which provided, in part, as follows:

"SEC. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the

property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America."

In accordance with such Resolution, which was incorporated in the Treaty of Berlin between the United States and Germany, signed in Berlin on August 25, 1921 (42 Stat. 1939), an Executive Agreement between the United States and Germany was signed at Berlin on August 10, 1922 (42 Stat. 2200) providing for the creation of the Commission, a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty. A copy of that agreement is annexed to the complaint herein as Exhibit A. The time for filing claims was extended by an Executive Agreement, dated December 31, 1928 (45 Stat. 2698), between the United States and Germany and by it all claims notified to the Department of State prior to July 1, 1928, were admitted to the consideration of the Commission.

The first meeting of the Commission was held on October 9, 1922, and the last meeting took place on October 30, 1939. The Commission as originally organized consisted of Mr. Justice William R. Day, of the United States Supreme Court, who was commissioned under date of August 19, 1922, to serve as Umpire; the Honorable Edwin B. Parker, who was commissioned under date of October 7, 1922, as American Commissioner, and Dr. Wilhelm Kiesselbach, who served as German Commissioner from the first meeting of the Commission on October 9, 1922 until May 31, 1934, when the appointment was announced of his successor, Dr. Victor

L. F. H. Huecking. Mr. Justice Day resigned as Umpire on account of ill health on May 15, 1923. The Honorable Edwin B. Parker was, on May 21, 1923, commissioned as Umpire to succeed Mr. Justice Day, and the Honorable Chandler P. Anderson was, on June 14, 1923, appointed American Commissioner. Following Judge Parker's death on October 30, 1929, the Honorable Roland W. Boyden was, on January 9, 1930, commissioned as Umpire. Mr. Boyden continued to serve as Umpire until his death on October 25, 1931. Mr. Justice Owen J. Roberts, of the United States Supreme Court, was, on March 24, 1932,

commissioned as Umpire to succeed Mr. Boyden. On the 2nd day of August, 1936, Mr. Anderson died and he was succeeded as American Commissioner on September 12, 1936, by the Honorable Christopher B. Garnett. Dr. Victor L. F. H. Huecking announced his retirement as German Commissioner on March 1, 1939, and no successor has been announced by Germany to fill the vacancy thus caused.

The first American Agent was the Honorable Robert C. Morris, who was commissioned under date of September 26, 1922. Mr. Morris resigned as American Agent on May 24, 1923, and the Honorable Robert W. Bonyng, was, on June 16, 1923, commissioned as American Agent. As hereinbefore recited, Mr. Bonyng served until his death on September 22, 1939, whereupon the undersigned was designated Acting Agent for the United States. Dr. Karl von Lewinski served as German Agent from the organization of the Commission until his resignation on March 17, 1931. He was succeeded as Agent of Germany by Dr. Wilhelm Tannenberg on March 18, 1931. Dr. Johann G. Lohmann on May 18, 1933, succeeded Dr. Tannenberg as Agent of Germany, and on May 16, 1934, the appointment was announced of

the present Agent of Germany, Dr. Richard Paulig.

70 All of the claims presented to the Commission had their origin in loss of life or injury suffered by American nationals or the loss of or damage to their property or the property of the United States and were made by the United States acting on behalf of its nationals or on its own behalf. The conduct and control of the proceedings by the claimant government before the Commission rested entirely with the Agent of the United States. The claims were all made against the Government of Germany, and the defense of the claims was under the control of the Agent of Germany.

In Administrative Decision No. II Umpire Parker said (Decs. & Ops., p. 8):

"The United States is claimant.—Though conducted in behalf of their respective citizens, governments are the real parties to international arbitrations. All claims, therefore, presented to this Commission shall be asserted and controlled by the United States as claimant, either on its own behalf or on behalf of one or more of its nationals. If in the decisions, opinions, and proceedings of the Commission

American nationals are referred to as claimants it will be understood that this is for the purpose of convenient designation and that the Government of the United States is the actual claimant."

Among the claims presented to the Commission were the so-called sabotage claims arising from the destruction of the railroad terminal of the Lehigh Valley Railroad Company in New York Harbor known as Black Tom Island, N. J., and of the Kingsland, N. J., assembly plant of Agency of Canadian Car and Foundry Company, Limited, a New York corporation (hereinafter called the Black Tom and Kingsland cases, respectively) by sabotage agents employed or authorized by German military, naval or other governmental authorities. These consisted of one

71 hundred fifty-three claims of some 93 American nationals suffering death, injury and property losses in the two destructions amounting according to said claims to over \$23,300,000, exclusive of interest. All said claims had been duly and properly notified to the Department of State prior to the expiration of the time for notification thereof on June 30, 1928, under the Executive Agreement of December 31, 1928, between the Government of Germany and the Government of the United States, and thereby were within the class of claims which the Governments of Germany and the United States had agreed should be submitted to the Commission for adjudication. Memorials in all of said claims were duly and properly submitted to the Commission together with evidence in support thereof.

The Memorial of the United States on behalf of the Lehigh Valley Railroad Company in the Black Tom case, which had been filed on March 16, 1927, was answered by the German Agent on December 14, 1927, and the Memorial of the United States on behalf of Agency of Canadian Car and Foundry Company, Ltd. in the Kingsland case, which had been filed on March 26, 1927, was answered on January 17, 1928.

Protracted efforts commencing in 1924 to dispose of the so-called sabotage claims by way of settlement were made and several tentative offers of settlement involving the payment of very substantial sums were put forward by the then German Agent, but before the passage of the Settlement of War Claims Act of 1928 (45 Stat. 254) the Ger-

man Agent finally advised the Agent of the United States that his Government would not authorize a settlement of the sabotage claims. Under the Settlement of War Claims Act provision was made for the return to the former owners of 80% of the property referred to in said Section 5 of the Knox-Porter Resolution seized as belonging to German enemy nationals. In accordance with said provisions of said Settlement of War Claims Act of 1928, approximately one hundred and thirty million dollars have since the passage of that act been returned to said German nationals.

At the time the Settlement of War Claims Act of 1928 was under discussion by the Committee of Finance of the United States Senate, E. H. Boles, Esq., General Counsel for Lehigh Valley Railroad Company, one of the principal claimants in the Black Tom case, and intervener herein, urged an amendment which would have had the effect of postponing the payments of all awards of the Commission to American nationals and of all claims of German nationals until the final completion of the work of the Commission (Hearings before the Senate Finance Committee, 70th Congress, H. R. 7201, January 23-26, 1928, pp. 134-139). The German Agent opposed the proposed amendment although Judge Parker, the then Umpire, informed the Committee that he thought "it would be a very good amendment" (id., Hearings, p. 194). The proposed amendment was not adopted. In connection with the discussion on the advisability of withholding all payments until the work of the Commission was completed, Judge Parker was questioned by one of the members of the Committee as to what the Commission would be able to do if Germany "declined to appear" before a decision could be rendered in the sabotage claims. The Report of the Senate Finance Committee hearings reads in part as follows:

"Senator McLean. You have jurisdiction?

"Mr. Parker. Yes; we have jurisdiction in any event.

But if Germany in any case should arbitrarily decline to file an answer to the American memorial or submit testimony within the period prescribed by these rules, the commission would consider that case on its merits, not by default, but on the merits of the case made by the American agent.

"Senator McLean: If they deliberately declined to appear and make any presentation, would you feel justified in rendering judgment in the case?"

"Mr. Parker. Unquestionably we would take the case as presented by the American Agent and decide it according to the record made by the American agent." (Id., Hearing, pp. 192, 193)

Evidence in support of and in opposition to the so-called sabotage claims was filed by the respective Agents of the two Governments. On March 20, 1929, the Commission by unanimous action entered an order setting down the sabotage cases for oral argument beginning April 3, 1929. That order also provided for certain special additional rules, applicable to the sabotage cases, including a provision that the Umpire should sit with the National Commissioners throughout the argument of such cases. In accordance with the foregoing order and with the practice of the Commission uniformly adopted in connection with the sabotage cases, the Umpire sat with and deliberated with the National Commissioners in all hearings and deliberations relating to the sabotage cases. On April 3, 1929, the cases were heard in oral argument, extending for nine days. The oral argument covered all phases of the merits of the claims except the question of the measure of damages, with respect to which voluminous evidence had theretofore been filed. The German Agent in his answers to the memorials filed on behalf of the Lehigh Valley Railroad

Company and Agency of Canadian Car and Foundry
74 Company had suggested that consideration of the question of the measure of damages should be postponed until after the determination of the question of Germany's liability. In briefs of the American Agent filed in those claims in May and June, 1928, the American Agent stated that this suggestion of the German Agent was acceptable to him and that his briefs then filed would be restricted solely to the question of Germany's liability.

At the close of the argument in April, 1929, the Commission by order of May 1, 1929, called for the filing of additional evidence by both sides, as a result of which many additional exhibits were filed by both the German and American Agents. On October 30, 1929, Umpire Parker died and Mr. Boyden was appointed to succeed him. On

September 18, 1930, the cases were reargued at The Hague, the argument covering a period of twelve days. On October 16, 1930, the Commission decided "both cases in favor of Germany" although the final announcement of the decision was not made by the Commission in its records until a meeting held January 9, 1931. A full copy of the decision, sometimes referred to as the "**Hamburg decision**" is contained in the publication of the Commission entitled "Administrative Decisions and Opinions of a General Nature and Opinions and Decisions in Certain Individual Claims from October 1, 1926, to December 31, 1932", etc., U. S. Government Printing Office 1933 (hereinafter referred to as Decs. & Ops.) at page 967.

A petition for rehearing the Black Tom claims was filed on January 12, 1931, and a similar petition in respect of the Kingsland claims was filed on January 22, 1931. These

petition sought a rehearing upon the grounds that

75 the Commission had committed errors in its findings

of fact on the evidence submitted; that the Commission

had committed errors in failing to apply established

principles of law to the proof as disclosed in the record;

and that the Commission had acted irregularly in arriving

at its decision of October 16, 1930, in that the Umpire partici-

parted with the National Commissioners in their deliber-

ations and thus deprived the United States of the inde-

pendent judgment of the National Commissioners uninflu-

enced by the opinion of the Umpire.

The Commission was notified in these petitions that investigations were being conducted with a view to meeting certain evidence filed by Germany at a very late date prior to the argument at the Hague. In its opinion of March 30, 1931 (Decs. & Ops. 995-997) the Commission dismissed the two petitions, and stated with respect to the alleged irregularity in the procedure followed by the Commission:

"This question is raised by the American Agent's claim that the decision was irregularly rendered because the Umpire participated in the deliberations of the National Commissioners and in the opinion of the Commission. The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, a practice never before questioned and

not in our judgment of doubtful validity even if it had not so long been accepted by all concerned." (Decs. & Ops., p. 996)

In a letter, dated March 30, 1931, the Commission informed the two Agents that the decision of March 30, 1931, related "to the record as it stood when the cases were decided, and the decision reserves the question of the proposed admission of new evidence, which is a separate question."

The letter requested each Agent

76 "without waiting for the presentation of any additional new evidence, to submit briefs discussing, first, the jurisdictional considerations and legal principles which should govern the Commission's decision as to the admission of new evidence in these cases, and, second, what kind of new evidence, if any, should be admitted."

A copy of such letter is attached hereto and marked Exhibit 1.

In the brief of the German Agent, filed April 27, 1931, in response to the request contained in the foregoing letter, the German Agent took the position that the Commission was without jurisdiction to reopen any case in which it had once rendered a decision. On May 27, 1931, the Agent for the United States filed a motion with the Commission requesting decision on the jurisdictional question on the power to reopen a claim. No formal ruling was given by the Commission at this time on that motion.

On July 1, 1931, a supplemental petition in the two claims was filed together with new evidence. On July 28, 1931, the Commission entered an order directing the Joint Secretaries to "receive provisionally the evidence offered", reserving "for later decision the question of its right to admit new evidence and all other questions arising in connection with the aforesaid petition if the evidence be admitted." A copy of such order is attached hereto and marked Exhibit 2.

On July 30-August 1, 1931, oral argument was had in Boston. At the conclusion of this hearing, steps were taken by the Commission which led to the introduction of much

new evidence both by the German Agent and the Agent for the United States.

Further oral argument took place in Washington during the period from November 21 to November 25, 1932. In the course of the argument, the Agent for the United States, (Hon. Robert W. Bonyng) inquired as to the attitude of the German Government on the question of the right of the Commission to determine its jurisdiction to reopen the cases as follows (Oral Argument, November, 1932, pp. 243-4):

"I am not sure what the attitude of Germany may be in reference to the jurisdictional question. I am not certain whether it is the attitude of Germany that it will not submit to this Commission jurisdictional questions for its consideration and determination. If that be the attitude of Germany, I think we should know it at the very beginning. I think we should have known it a year and half ago. If that be the attitude of Germany, then all that has occurred during the past year and a half has been useless. If Germany takes the position that this Commission has no right to consider and determine the jurisdictional question, then this whole proceeding for the past year and a half has been little less than a farce.

"If on the consideration and determination by the Commission of the evidence which has been submitted for a reconsideration of the decision of the Commission on October 16, 1930, the Commission should upon such determination decide that Germany is liable for both of these destructions, then, if Germany were to take the attitude that the decision of the Commission would not be binding on Germany, it means that Germany is simply submitting its evidence and considering these cases at the present time, but reserving to the end the position which the German Agent announced as the position of Germany, that this Commission has no jurisdiction or power to consider the question as to the right to reopen the case. I can hardly conceive that that is possible, and yet that may be what was intended by reading that protest at the very beginning of the argument."

Thereupon, the following discussion took place:

"The Umpire. What I understood and what we all understood the German Agent to suggest was that he presents to this Commission the proposition that its construction of the treaty should be that it has no power now to rehear this case. I did not understand him to take the position that the Commission could not consider the question of its own jurisdiction. If he desires to clear that question, he may do so.

"The German Agent. The understanding of the Commission is entirely correct.

"The Umpire. In other words, that is a justiciable question here.

"The German Agent. Yes.

"The American Agent. I am very glad to have that cleared up at the beginning of the argument."

78 The full oral argument is contained in a publication of the Commission entitled "Oral Arguments, Washington, November 21-25, 1932." On November 28, 1932, the National Commissioners certified their disagreement to the Umpire on all questions involved

"except that the German Commissioner takes the position that the question of the jurisdiction of the Commission to reexamine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate." (Decs. & Ops., p. 1004)

On December 3, 1932, the Umpire, Mr. Justice Roberts, handed down the decision of the Commission dismissing the supplemental petition for rehearing on the ground that the new evidence was not as a matter of fact sufficient to alter the decision of October 16, 1930 (Decs. & Ops., pp. 1004-29). The question of the jurisdiction of the Commission to reopen the cases by the introduction of new evidence was left undecided.

Thereafter, the American Agent proceeded to conduct a number of investigations and evidence was gathered which, together with the other evidence, in the judgment of the American Agent justified him in filing a further petition for a rehearing of the sabotage cases on the ground that

certain important witnesses for Germany had furnished fraudulent, incomplete, collusive, and false evidence which had misled the Commission in reaching its decisions of October 16, 1930 and December 3, 1932; that the testimony of certain other witnesses within the territorial jurisdiction of the United States having a knowledge of the facts relating to the destructions at both Black Tom and Kingsland could only be satisfactorily obtained pursuant to subpoenas issued under the Act of July 3, 1930 (46 Stat. 1005);

79 and that there was evidence which had recently come to light establishing collusion of a most serious nature between certain of the German and American witnesses. This petition was filed on May 4, 1933, and a copy thereof is attached hereto marked Exhibit 3.

On October 19, 1933, the Under-Secretary of State of the United States, Honorable William Phillips, addressed to the American Agent a letter reading as follows:

"Department of State
Washington

October 19, 1933.

The Honorable Robert W. Bonyngé,
Agent of the United States, Mixed Claims
Commission, United States and Germany,
Investment Building,
Washington, D. C.

Sir:

The Department encloses a copy of a note, dated October 11, 1933, received by it from the German Ambassador, stating that his Government considers petitions for rehearing to be in conflict with the provisions of paragraph 3, Article VI of the Agreement of August 10, 1922, between the United States and Germany, and that the Commission is without authority to pass upon a difference of opinion between the two Governments on this question. The Ambassador states that it is his understanding the same opinion is held by the German Commissioner, Dr. Kiesselbach.

It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission

itself. It is understood that the American and German Commissioners hold divergent views on this question and that in a normal course of procedure, under the claims agreement and the rules of procedure adopted by the Commission, the matter would be submitted to the Umpire for decision.

It is desired that you promptly bring this communication and its enclosure to the attention of the American Commissioner or the full Commission, as in your judgment may seem proper, for the purpose of obtaining the decision of the Umpire on this disputed point.

Very truly yours,

For the Secretary of State:

WILLIAM PHILLIPS

Under Secretary

Enclosure:

Copy of note dated October 11, 1933, from the German Ambassador

80

[Enclosure]

Translation

Deutsche Botschaft Washington, D. C., October 11, 1933.

Mr. Secretary:—

Pursuant to yesterday's conference between a member of my staff and officials of your Department I have the honor to communicate to Your Excellency the following:

The German Government (as stated in the Embassy's note of July 6, 1933, and in my conversation on August 24, 1933, with the Acting Secretary of State, Mr. Wilbur J. Carr) considers petitions for rehearing in conflict with existing treaty provisions, as contained in paragraph 3, Art. VI of the agreement of August 10, 1922, between the United States and Germany. The German Government regards the commission as being without authority to pass upon a difference of opinion which may exist between the two governments in this connection.

Incidentally I understand this same opinion is held by the German Commissioner, Dr. Kiesselbach.

In February of this year Dr. Meyer, First Secretary of the Embassy, was named Acting German Commissioner

for the sole purpose of expediting such formalities as would be found necessary for the conclusion of the commission's work. He has no authority to act with respect to the petitions offered by the American Agent in April and May of this year, but he is still authorized to participate in the formal conclusion of the compromises tentatively agreed upon in February, provided that the work of the Commission would be definitely closed.

Accept, Your Excellency, the renewed assurance of my highest consideration.

(sgd.) LUTHER

The Honorable Cordell Hull
Secretary of State of the United States of America
Washington, D. C. (Minutes pp. 1599, 1600).

In referring to the above communication from the Under-Secretary of State and its enclosure the American Commissioner, at a meeting of the Commission on October 31, 1933, made the following statement:

"This correspondence relates to only two petitions for rehearing: (1) The petition on behalf of the New York Fire Insurance Company, as Successors to Norwegian Underwriters, Docket No. 3120, which petition was presented April 17, 1933; and (2) the petition in the so-called sabotage cases, Docket Nos. 8103, 8117, et al., which petition was presented May 4, 1933.

"It is appropriate to state at this point, for the purpose of simplifying the discussion, that although the two
81 national Commissioners have disagreed as to the jurisdiction of the Commission to reconsider the decision of the Commission in the sabotage cases, it does not appear that they have disagreed as to the action to be taken by them on the petition in the Underwriters claim, and the American Commissioner now states that if the German Commissioner considers that that petition should be dismissed on the merits he is prepared to agree with him in that respect.

It follows, therefore, that the question now under consideration relates solely to the action to be taken with reference to the sabotage cases.

It further appears, from this correspondence, that the Government of the United States considers that 'the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself', and desires that the Umpire of the Commission shall render a decision on this point.

The American Commissioner concurs with the view of the Government of the United States that this question of jurisdiction is one properly to be decided by the Commission itself, and that the Umpire is authorized to render the decision of the Commission on that point.

On the other hand, the German Government 'regards the Commission as being without authority to pass upon a difference of opinion which may exist between the two Governments in this connection.'

The American Commissioner regards this attitude of the German Government as an attempt to limit, without the consent of the Government of the United States, the jurisdiction conferred upon the Commission by the two Governments in their Agreement of August 10, 1922, in order to determine independently of the Commission, and on political or other considerations, questions submitted by virtue of that Agreement to the Commission for decision on purely legal grounds.

It also appears from the German Embassy's letter to the Secretary of State that the Acting German Commissioner, appointed as substitute for Dr. Kiesselbach, is acting under a very limited authority in that, as stated in that letter, he was named 'for the sole purpose of expediting such formalities as would be found necessary for the conclusion of the Commission's work', and 'has no authority to act with respect to the petitions offered by the American Agent in April and May of this year'. It further appears that so far as those petitions are concerned, Dr. Kiesselbach is still in full authority as the German Commissioner." (Minutes, pp. 1600-1602.)

A copy of the minutes of the Commission of October 31, 1933, including the above statement of the American
82 Commissioner, is attached hereto and marked Exhibit 4. At the meeting of the Commission, held on October 31, 1933, the American Commissioner submitted a

certificate of disagreement, dated the same day, signed only by himself, and under date of December 15, 1933, the Umpire handed down the decision of the Commission holding that the question was properly before him on such certificate of disagreement and further:

" * * * that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand."

In his opinion the Umpire had the following to say:

"I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered."

The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion."

A copy of said decision in full is attached hereto and marked Exhibit 5. It also appears in a publication by the Commission entitled "Report of American Commissioner, Mixed Claims Commission, United States and Germany, December. 30, 1933", pp. 63-76.

In a substantial number of claims other than the sabotage claims the Commission has set aside and reversed its earlier decisions dismissing claims and has thereafter on agreed statements recommending

awards, signed by both the German Agent and the Agent of the United States, entered awards on such claims. Among the claims which had been dismissed by the Commission but which were subsequently reopened and awards granted thereon by the Commission without any objection on jurisdictional grounds are the following:

Docket #6288, Harby Steamship Company, Inc.

Docket #7676, Thomas S. Hamlin

Docket #7796, Edward Nickerson

Docket #7978, Wollenberger & Co.

Docket #8094, Elizabeth Achelis et al.

Dockets #8145, 8146, 8147, 8148, 8149, the Sprunt Claims

Docket #13787, Lezcano & Co.

Docket #15884, Paul Devantier

After the decision of December 15, 1933, in the sabotage cases, further evidence was filed by the American Agent in support of the Petition of May 4, 1933. The evidence in support of the Petition included the testimony of a large number of witnesses examined under subpoena issued in five different United States District Courts under the Act passed on June 7, 1933 (48 Stat. 117) which permitted the American Agent to subpoena witnesses. This Act was an amendment to the Act approved July 3, 1930, referred to above and became necessary as a result of objections raised by Germany to the use of the original Act as a means for subpoenaing witnesses in the sabotage cases. The only time the American Agent found it necessary to issue subpoenas to compel the giving of testimony was in connection with the sabotage cases. In the favorable Report of the Committee on the Judiciary of the Senate the following is said:

"The necessity for this legislation became apparent in connection with claims pending before the Mixed Claims Commission, United States and Germany, when the American agent, prosecuting meritorious claims on behalf of American citizens, was thwarted by the lack of power under the treaty creating the Commission to compel the testimony of witnesses and the production of documentary evidence. The act approved July 3, 1930; was designed to remedy this situation by conferring upon any such commission the power to compel by process the testimony of witnesses and the production of documen-

tary evidence. However, upon the objection of the German agent, it was held that as this new legislation increased the powers of the Commission beyond those agreed upon by the treaty creating the Commission, the power so conferred could not properly be invoked.

This bill is not open to the same objection, in that it does not increase the power of any existing international tribunal or commission. It does make available to the American agent thereof the right to apply to a Federal district court for the necessary process to enforce the giving of otherwise reluctant testimony and the production of otherwise unavailable documentary evidence necessary to a full and fair disclosure of the facts surrounding claims pending before such tribunal or commission, whether now or hereafter established. It affords an immediate as well as a future remedy, and places American agents on a parity with foreign agents in this respect.

The bill has the approval of the Department of State as well as that of the American agent of the Mixed Claims Commission." (Senate Report No. 88 to accompany S. 1581, 73rd Congress, 1st Session)

At a meeting of the Commission held on May 7, 1934, the German Agent referred to an exchange of notes between the then German Ambassador, Dr. Luther, and the Secretary of State wherein it was agreed that the Commission should not in the future be asked to consider any new cases or cases already decided, other than the sabotage cases and one other case upon which a petition for reopening was also pending. An extract from the minutes of said meeting including the letters containing said agreement is attached hereto and marked Exhibit 6.

Subsequently, additional evidence was filed by the Agents of both Governments and in May, 1936, the cases again came on for oral argument at Washington before the Commission, constituted then of Mr. Justice Roberts as Umpire, the German Commissioner, Dr. Huecking, and the American Commissioner, Mr. Chandler P. Anderson. The oral argument extended from May 12, 1936 to May 85 28, 1936, and on June 3, 1936, the Commission unanimously set aside the decision of December 3, 1932.

Attached hereto is a copy of the decision of the Commission of June 3, 1936, as Exhibit 7. Subsequent to this deci-

sion the Umpire and the German Commissioner called for the production of certain additional evidence to be furnished by both the Agent for the United States and the Agent of Germany. A meeting of the Commission was called for June 17, 1936, to proceed further with the cases but on June 16, 1936, the German Agent moved the Commission for a postponement of the meeting to be held on June 17, 1936. A copy of said motion is attached hereto as Exhibit 8. The American Agent replied to said motion on June 17, 1936. A copy of said reply is attached hereto and marked Exhibit 9. The motion of the German Agent was granted by the Commission on June 17, 1936.

Thereafter a delay of over one year in the conduct of the cases ensued due largely to settlement negotiations which resulted in an agreement of settlement covering the sabotage cases, which settlement however was not effectuated before the Commission by the German Agent and was consequently not recognized by the Commission. Accordingly, in 1937, it became necessary to continue with the trial of the cases. Much additional evidence was thereafter filed by both sides and from January 16 to January 27, 1939, the cases were again argued orally.

Prior to the argument in May, 1936, the American Agent had requested the Commission to determine in the next proceedings not only the issues raised by the Petition of May 4, 1933, but also the question of the liability of Germany on the claims. The Commission by a decision of the Umpire dated July 29, 1935, a copy of which is attached
 86 hereto and marked Exhibit 10, decided that the procedure would be to consider first the question of granting a rehearing under the motion of May 4, 1933, and later the merits of the claims. Again on June 3, 1936, the Commission decided that the question whether a rehearing of the claims be granted should, under its decision of July 29, 1935, be determined by a hearing separate and distinct from an argument on the merits unless Germany should consent to a different course. In his brief filed on September 13, 1938, the Agent for the United States renewed his request that the Commission reverse its decision of October 16, 1930, and render a final decision in favor of the United States in both the Black Tom and Kingsland claims. He said:

"The respective governments have spent years in the collection of evidence without any restriction on its nature and almost without limitation as to the time afforded to file it. Since the 1936 hearing the German Agent has been permitted to file, and has filed, evidence without regard to whether it related to the so-called fraud issue or to the cases on the merits—a distinction which, for all practical purposes, has long since disappeared. By reason of the fact that it has been a requisite part of the American Agent's case to prove that the Commission has been misled on material issues by false evidence, the very proof which has been introduced to support the pending motions necessarily affects the merits of the cases. The Herrmann message, for example, alone establishes the responsibility of Germany; other contemporaneous documents which lead to the responsibility of Germany for the destructions simultaneously prove the falsity of the entire German defense.

Further argument on the merits would, therefore, be only a form and would constitute a source of delay not warranted by any considerations of justice to the parties.

The American Agent, therefore, requests the Commission not only to set aside but to reverse the Hamburg decision and thus render a final decision in favor of the United States in both cases." (U. S. Brief filed 9/13/38, pp. 112-

3)

87 The German Agent in his brief filed November 16, 1938, in reply to the request of the American Agent, said:

"Should the request of the American Agent to pass upon the merits of the claims be construed as a request to reverse the decisions of July 29, 1935 and June 3rd, 1936 (the latter insofar as it confines the litigation to the issue of fraud), the German Agent wishes to state, that in that case he will request the Commission to review its decision of December 15, 1933 concerning the question of jurisdiction to entertain a petition for rehearing in a case finally decided." (pp. 2-3)

The American Agent on oral argument on January 27, 1938 again renewed his request that the Commission render final awards in favor of the United States. He said

"The question now arises, what course of procedure the Commission should follow, and whether, if it sets the deci-

sion at Hamburg aside it should proceed on to consider and decide the merits forthwith. Mr. Mitchell and I have always been in accord with the view that the Commission should do this, and we joined in the application in 1934 for an order specifying this procedure. The Commission, however, made an order limiting us at this hearing to a discussion of the question of fraud and suppression at The Hague.

The German Commissioner and, I think, the German Agent, also, objected to the procedure that we asked the Commission to follow. Mr. Mitchell has felt constrained by this order to limit his argument within its scope, and he has been reluctant to insist that the Commission vacate that order and dispose of all issues in this case at once. He and I have been in entire accord in the view that if the decision at Hamburg is set aside, the further task of the Commission will be simple, and the inevitable outcome would be an award in favor of the United States.

I feel no such hesitation or restraint in asking the Commission to depart from the procedures as heretofore outlined by order, and to proceed not only to consider the question of fraud and suppression, but to go on and to render an award on the merits. The case has been fully discussed from every possible standpoint. The German Agent has discussed the merits. Every conceivable argument that can be made has already been made, and it would be simply going over exactly the same ground if a further hearing should be had.

My position in that respect is fortified by the course of the German Agent, and the fact that the defense has not confined itself to the fraud issue." (Wash. Arg., 1939, pp. 864-5)

88 Prior to the commencement of the hearings in January, 1939, there had been filed in these claims over 100,000 pages of evidence gathered from all over the world and over 70 briefs had been submitted. The argument in January, 1939, was the sixth oral argument had in these cases. These arguments extended over a total period of approximately 60 days.

At the close of the hearings on January 27, 1939, the Commission entered upon its deliberations on the questions

presented by the pleadings, briefs and the oral argument. On March 1, 1939, the German Commissioner notified the Commission of his retirement from the Commission. On June 7, 1939, the American Commissioner issued notices of a meeting of the Commission to be held on June 15, 1939, and the German Agent acknowledged receipt of this notice in his letter to the American Joint Secretary reading as follows:

1439 Mass. Ave., N. W.
Washington, D. C.
June 10, 1939.

"Mixed Claims Commission
United States and Germany
German Agency

Mr. Walter R. Dorsey
American Joint Secretary,
Mixed Claims Commission,
United States and Germany,
Washington, D. C.

Dear Mr. Dorsey:—

With reference to the 'Notice of meeting', dated June 7, 1939, in which you inform me by direction of the American Commissioner that 'a meeting of the Mixed Claims Commission, United States and Germany, will be held on Thursday, June 15th, 1939, at 11:00 o'clock a.m., in the large conference room of the United States Supreme Court Building.' I hereby advise you that in view of the note addressed by my Government to the Department of State today, I shall not appear at the meeting.

Very truly yours,

RICHARD PAULIG,

German Agent." (Min. p. 1711).

89 This letter was placed in the record of the Commission in these cases. The note from the German Government to the Department of State referred to in said letter of the German Agent was filed in the records of the Commission and reads as follows:

"Translation

German Embassy

Washington, D. C.,

June 10, 1939.

Mr. Secretary of State:

I have the honor to advise Your Excellency of the following:

As the German Agent on the German-American Mixed Commission reports, a written notice from the American Secretary of the Commission, according to which the Commission will hold a meeting at 11 a.m. on June 15th in the large conference room of the United States Supreme Court Building, was received by him on June 7th, of this year.

By direction of my Government, I call attention to the fact that since the withdrawal of the German Commissioner, Dr. Victor Huecking, on March 1st of this year, of which I notified the American Government by a note to Your Excellency of March 24th of this year, the Commission has been incompetent to make decisions and that consequently there is no legal basis for a meeting of the Commission at this stage. By direction of my Government, I advise you that the Government of the Reich will ignore the decision to call the meeting on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure.

Accept, Mr. Secretary of State, the renewed assurance of my most distinguished consideration.

THOMSEN.

His Excellency

Mr. Cordell Hull,

Secretary of State of the United States,

Washington, D. C." (Min. p. 1712)

On June 15, 1939, a meeting of the Commission was held and there was spread upon the minutes of the meeting certain correspondence, all relating to the retirement of the German Commissioner, as follows:

Letter dated March 1, 1939, from the German Commissioner to the Umpire. Exhibit 11 hereto attached. (Min. pp. 1703-1706.)

Letter dated March 2, 1939, from the Umpire to the German Commissioner—Exhibit 12 hereto attached. (Min. p. 1706.)

Letter dated March 1, 1939, from the German Commissioner to the American Commissioner—Exhibit 13 hereto attached. (Min. pp. 1706, 1707.)

Letter dated March 3, 1939, from the American Commissioner to the German Commissioner—Exhibit 14 hereto attached. (Min. pp. 1707, 1708.)

Report dated March 3, 1939, from the American Commissioner to the Secretary of State—Exhibit 15 hereto attached. (Min. pp. 1709-1711.)

Letter dated June 10, 1939, from the German Agent to the American Joint Secretary—Exhibit 16 hereto attached. (Min. p. 1711.)

Letter dated June 10, 1939, from the Secretary of the former German Commissioner to the American Joint Secretary—Exhibit 17 hereto attached. (Min. p. 1712.)

Note from the German Embassy to the Secretary of State dated June 10, 1939—Exhibit 18 hereto attached. (Min. pp. 1712, 1713.)

The report dated March 3, 1939, from the American Commissioner to the Secretary of State (Exhibit 15) reads as follows:

“The American Commissioner
Mixed Claims Commission
United States and Germany
Department of State
Washington, D. C.

March 3, 1939.

Honorable Cordell Hull,
Secretary of State,
Washington, D. C.

Dear Sir:

I have the honor to submit to you a report of the action of Dr. Victor L. F. H. Hueckling, German Commissioner, Mixed Claims Commission, United States and Germany, announcing his retirement from the post as German Commissioner.

Under date of March 1, 1939, Dr. Hueckling sent to Mr. Justice Roberts, the Umpire, a letter announcing his retire-

ment. A copy of that letter is attached hereto, together with a copy of Mr. Justice Roberts' reply.

Under the same date, March 1, 1939, Dr. Huecking forwarded to me a letter apprising me of the fact that he had sent the aforesaid letter to Mr. Justice Roberts. I am attaching hereto a copy of Dr. Huecking's letter and of my reply thereto.

I think it proper to give you the recent history of this case. The primary question now before the Commission is whether the decision which was reached at Hamburg, October 16, 1930, was induced by fraudulent and collusive evidence. In considering this question, the Commission has been operating under the decision of the Umpire rendered December 15, 1933. In order to reach a conclusion, it has been necessary for the Commission to take into consideration, not only the evidence filed since the Hamburg decision, but also the evidence filed theretofore. The whole record covers between thirty and forty thousand pages, and of this, the evidence filed since the decision at Hamburg covers about fifty per cent.

The taking of evidence on this case was closed on the 14th day of January, 1939, and very voluminous briefs have been filed on both sides on every feature of the case. After extensive arguments covering twelve days, the case was submitted to the Commission on the 27th day of January, 1939.

After about two weeks had elapsed, the Umpire and the Commissioners began their conferences, and these conferences continued, but not on consecutive days, until Tuesday, February 28, 1939, when the last conference was held. Another conference was scheduled to be held on Thursday, March 2, 1939, at the office of the Umpire. Shortly before the time for the conference the letters from Dr. Huecking were delivered to the Umpire and myself, respectively.

As will be indicated clearly by my reply to Dr. Huecking's letter, the subject of these conferences was whether the evidence which had been adduced had proven fraud which was sufficient to set aside the decision at Hamburg. During these conferences, I expressed to the Umpire and the German Commissioner my opinion that the decision at Hamburg had been reached on false and fraudulent evidence and that the proof of fraud was sufficient to set aside the Hamburg decision, and reopen the case.

92

After the conference had extended for a considerable time, the Umpire expressed himself in entire agreement with me on this proposition. Thereupon the German Commissioner argued that, if upon an examination of the whole record both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before the Hague argument, the petition would have to be dismissed, and he urged upon the Umpire and myself that we should consider the whole evidence for that purpose. We thereupon proceeded to examine the whole record to determine from that records whether the American case had been proven. It was while the Commission was engaged in examining this question that Dr. Huecking's action in regard to his retirement was taken.

Very respectfully submitted,

CHRISTOPHER B. GARNETT,
American Commissioner.

CBG/AEC"

The meeting of June 15, 1939, of the Commission was attended by the American Commissioner and the Umpire. Neither the German Agent nor a Commissioner appointed by Germany attended this meeting. At that meeting the American Commissioner filed a certificate of disagreement and an opinion comprising 498 typewritten pages. In the course of his opinion the American Commissioner said (pp. 29-31A of the mimeographed copy of opinion):

"As we have already seen, these cases have been pending for more than twelve years. Thousands of pages of evidence, consisting of original documents from the files of the various government departments, affidavits, examinations of witnesses, and other instruments have been filed during that period; large sums of money have been spent in procuring this evidence and producing it before the Commission. It has been an enormous work, involving labor of many persons—experts, technicians and lawyers. The cases have been argued before the Commission on six different occasions by eminent counsel. Learned and exhaustive briefs have been filed, entailing great labor on the part

93 of those who composed them; and every phase of the case has been fully discussed, both in written briefs and orally. The oral arguments have consumed a period of about sixty days.

On the pending petition, the cases were closed for filing of evidence and briefs on January 14, 1939.

After exhaustive oral arguments by distinguished counsel, extending through twelve days, the cases were finally submitted to the Commission on the 27th day of January, 1939. After about two weeks had elapsed, the Umpire and the Commissioners began their conferences. These conferences continued, but not on consecutive days, until Tuesday, February 28, 1939, when the last conference with the German Commissioner was held. Another conference was scheduled to be held on Thursday, March 2, 1939, at the office of the Umpire. Shortly before the time for the conference, the letters of the German Commissioner announcing his retirement were delivered to the Umpire and the American Commissioner, respectively.

As is clearly indicated by the letter which was written by the American Commissioner to the Secretary of State, the American Commissioner and the German Commissioner were in direct disagreement as to the issues before the Commission, that is to say, as to whether the record established fraud of a sufficient character to set aside the decision at Hamburg, and, at the instance of the German Commissioner, the Commission was examining the record to determine whether the American Agent had proven his case, and specifically whether the Herrmann message was genuine, when the German Commissioner announced his retirement.

Under the circumstances set out above, to hold that one National Commissioner could, by his voluntary retirement, whether authorized by his Government or not, prevent the Commission from further proceeding with the cases, and especially from deciding the questions at issue when the German Commissioner announced his retirement, would defeat the purpose of the two Governments in establishing this Commission, would deprive the American nationals in these cases of the remedy provided by the Treaty of Berlin and the Agreement of August 10, 1922, for American nationals with claims against the German Government recog-

nized by that treaty, and would raise many questions difficult of solution, as to the disposition of the funds now remaining in the Treasury of the United States, pursuant to the Settlement of War Claims Act.

Accordingly, I am of the opinion that the retirement of the German Commissioner on March 1, 1939, did not render the Commission *functus officio* and did not deprive the Commission of the power to decide the questions at issue at the time of his retirement."

94 A copy of that portion of the opinion of the American Commissioner dealing with the jurisdiction of the Commission is attached hereto and marked Exhibit 19.

After the filing of the certificate of disagreement and the opinion of the American Commissioner, the Umpire handed down his decision. In the course of his decision the Umpire said:

"1. Within the meaning and intent of the agreement by which the Commission was constituted and its powers defined, there exists a disagreement between the two national commissioners. As I participated with them in the conferences after submission of the cases, I am cognizant of the disagreement, which makes it my duty to act in the decision of the cases. If more were needed, I have before me the certificate and opinion of the American Commissioner. Accordingly I report my opinion as Umpire.

7. I find that, for the reason alleged by the United States in its petitions for rehearing,—material fraud in the proofs presented by Germany, and for the further reason that on the record as it now stands the claimants' cases are made out, the pending motions should be and they are granted." The full text of the decision of the Commission by the Umpire is attached hereto as Exhibit 20.

Following the rendition of the decision of the Commission on June 15, 1939, setting aside the decision of October 16, 1930, and reopening the cases the American Agent made a motion that awards be granted in favor of the United States on behalf of the sabotage claimants as follows:

"If your Honors please, in view of the attitude of Germany, as expressed in the communications between the German Commissioner and the Umpire and the American Com-

missioner and the communication between the German Embassy and the Secretary of State of the United States, it is apparent that Germany does not intend to take any further part in the proceedings before this Commission, and seeks to avoid a final conclusion, and frustrate the work of the Commission I therefore move at this time, if your Honors please, upon the record as it now stands, that awards be entered in accordance with the opinions which have been rendered today." (Transcript of Hearings for June 15, 1939, pp. 20-21.)

The Commission granted said motion and on the same day duly entered an order upon the minutes of the Commission, reading as follows:

"1. The decision of October 16, 1930, reached at Hamburg be, and the same is hereby, set aside, revoked and annulled.

2. The Commission finds, on the record as it now stands, that the liability of Germany in both the Black Tom and Kingsland cases has been established.

3. It appearing from the communications, each dated June 10, 1939, one from the German Agent to the Commission, and the other from the German Embassy to the Secretary of State, that Germany does not intend to exercise her right to take further part in the proceedings of the Commission, and that on the findings made and opinions handed down this day by the Commission, and from what appears in the record, awards should now be rendered to the United States on behalf of claimants; the American Agent is directed to prepare and submit to the Commission for its approval awards in each of the pending sabotage claims. These awards will be considered at a further meeting of the Commission to be called on notice, and appropriate action thereon will then be taken." (Min. pp. 1717, 1718.)

On the same day said order was entered in the Minute Book which, in accordance with the custom of the Commission, is maintained in duplicate for the records of the two governments.

On October 23, 1939, the American Commissioner caused the American Joint Secretary to deliver personally to the German Agent a notice of a meeting of the Commission to

be held on October 30, 1939. Memoranda of Mr. Walter R. Dorsey, American Joint Secretary, setting forth the circumstances under which said notice was given to the German Agent and as entered in the record by the American Commissioner are attached hereto and marked Exhibits 21 and 22.

96 At the meeting of the Commission held on October 30, 1939, awards in favor of the United States in each of the 153 sabotage claims were duly entered by the Commission. In announcing these awards the American Commissioner said (Transcript of Hearings for 10/30/39, p. 25):

Memoranda of Awards.

The American Commissioner: In accordance with the orders entered on June 15, 1939, the American Agent and the Acting American Agent prepared and submitted to the Commission for its approval memoranda relating to all the pending sabotage claims and the awards to be entered.

Some of the questions which have arisen in the study of these cases are of a legal character, in which I have furnished the Umpire memoranda of the Acting American Agent and memoranda prepared by me relating thereto.

I have thoroughly examined the files for the purpose of determining the correct measure of damages in all of these cases, and have furnished the Umpire memoranda relating thereto. I have also furnished him a memorandum prepared by the Acting American Agent relating to the question of damages

Wherever the files disclosed as (sic) a question of fact or of law was raised, I have discussed it with the Umpire personally. I have presented to him for his consideration an award in each of the 153 sabotage cases."

The Umpire, thereupon, at the same meeting said (id. p. 25):

"The Umpire: After a study of the data and the records and the memoranda prepared, I have found that the awards are, in my judgment, accurately and properly calculated, and have joined the American Commissioner in signing the awards. They will be accordingly filed in the records of the Commission."

Neither the German Agent nor a Commissioner appointed by Germany attended this meeting.

97 A copy of the award entered in favor of the United States on behalf of the Lehigh Valley Railroad Company is attached hereto and marked Exhibit 23. A copy of the award to the Agency of Canadian Car and Foundry Company, Limited, a New York corporation, likewise entered on October 30, 1939, one of the Kingsland claimants, is attached hereto and marked Exhibit 24. Similar awards were entered at the above meeting in respect of the claims of the United States on behalf of each of the other sabotage claimants as set forth in Exhibit III attached to the answer of Intervener, Lehigh Valley Railroad Company.

I have read the allegation contained in paragraph 24 of the complaint herein in which it is stated on information and belief, that without right, power or authority the American Commissioner authorized the American Agent to determine the amount of said awards and the American Commissioner signed awards to the said claimants for amounts so fixed and assessed by the American Agent. This statement to my personal knowledge is wholly false. Extensive proofs of damages suffered by the sabotage claimants were in the record at the time of the retirement of the German Commissioner consisting of material contained in the Memorials of the respective claimants, and evidence in voluminous exhibits filed with the Commission over a period extending from approximately March, 1927, to November, 1936. Copies of all such Memorials and exhibits, according to the practice of the Commission were furnished to the German Agent on or about the date of the respective filing dates of such Memorials and exhibits. No evidence respecting damages was submitted to the Commission subsequent to November, 1936.

I have also read the allegations contained in paragraph 23 of the complaint herein in which it is stated upon information and belief that certain of the claimants who are beneficiaries of awards entered by the Commission as aforesaid were in whole or in part insured by insurance companies for the payment of some or all of the damages alleged to have been suffered by them and that said claimants received from said insurance com-

panies payment of part or of all of the damages so sustained and that by right of subrogation the said insurance companies likewise filed a claim for the amount of the payments of said damages paid as above stated to the claimants. The allegation in so far as it implies that an award to any sabotage claimant included any amount for which recovery was already had by way of insurance is wholly false. American underwriters insuring a portion of their loss in American insurance companies recovered the full insurance loss without deducting the amount of reinsurance with American companies. No recovery of that amount, however, was had on behalf of such American reinsurance companies. In submitting their evidence of damages as above described claimants were required to submit proofs as to insurance recovered and any amounts so recovered were deducted from the principal claims. No awards were entered by the Commission on behalf of others than American nationals.

At the same meeting of the Commission on October 30, 1939, and prior to the entry of award by the Commission the American Commissioner presented to the Commission a certificate of disagreement and supplemental opinion with respect to the question of jurisdiction of the Commission raised by a motion of the German Agent, dated November 24, 1936, and filed with the Commission on December 7, 1936, requesting the dismissal of the claim of the United States on behalf of Agency of Canadian Car and Foundry Company, Limited, a New York corporation. The question of the propriety of an award to the United States on behalf of Agency of Canadian Car and Foundry Company, Limited, had been discussed in briefs filed by the American Agent on January 22, 1937, and by the German Agent on January 12, 1939. The Umpire at the same time filed a memorandum opinion in which he concurred in the views of the American Commissioner on the question presented by the motion of the German Agent with respect to that claim; overruled the German Agent's motion and decided that the Commission had jurisdiction of the claim and that the United States was entitled to an award on behalf of that claimant. Copies of the certificate of disagreement and supplemental opinion of the American Com-

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missioner and of the Umpire's decision thereon are attached hereto as Exhibits 25 and 26.

Prior to the meeting of the Commission of October 30, 1939, there had been transmitted by the Secretary of State to the American Commissioner by a letter dated October 18, 1939, a copy of a translation of a note dated October 3, 1939, from the German Charge d'Affaires ad interim Herr Hans Thomsen to the Secretary of State and copies of said letter of transmittal and said note of the German Charge d'Affaires were filed in the record of these cases by the American Commissioner on October 30, 1939. Copies of such documents are attached hereto as Exhibits 27 and 28. A copy of the reply, dated October 18, 1939, of the Secretary of State to Herr Thomsen is attached hereto as Exhibit 29 and reads in part as follows (Transcript of Hearings, 10/30/39, p. 54):

"I must refrain from engaging in a discussion of the various complaints and protests set out in your communication and content myself by stating that since the Department is without jurisdiction over the Commission I consider that it would be highly inappropriate for it to intervene directly or indirectly in the work of the Commission, or to endeavor, in the slightest manner, to determine the course of its proceedings.

"I have entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite your severe and, I believe, entirely unwarranted criticisms, and I am constrained to invite
100 your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion."

Copies of the awards of the Commission entered on October 30, 1939, consisting of all the awards to the United States on behalf of the sabotage claimants, were duly certified to the Secretary of State on October 30, 1939. On October 31, 1939, the Secretary of State, pursuant to the provisions of Section 2(a) of the Settlement of War Claims Act of 1928, duly certified such awards to the Secretary of

the Treasury for payment in accordance with the provisions of the Act.

Z. & F. Assets Realization Corporation, the plaintiff herein, has received awards of the Mixed Claims Commission as follows:

Docket No. 6997—award entered May 25, 1926, in the amount of \$7,639.47 with interest at 5% per annum from January 1, 1920;

Docket No. 7023—award entered August 13, 1926, in the amount of \$8,150.09 with interest at 5% per annum from January 1, 1920;

Docket No. 7948—award entered January 14, 1927, in the amount of \$817,134.84 with interest at 5% per annum from January 1, 1920;

Docket No. 8199—award entered February 11, 1928, in the amount of \$3,000 with interest at 5% per annum from June 30, 1920; and

Docket No. 8369—award entered November 9, 1928, in the amount of \$4,074 with interest at 5% per annum from January 10, 1920.

The total principal amount of these awards is \$839,998.40 and according to the records of the American Agency furnished it by the Treasury Department there has been paid on account of these awards in accordance with the provisions of the Settlement of War Claims Act of 1928 the total amount of approximately \$864,050.

According to documents on file in the American Agency, a total principal amount of approximately \$118,000,000 has been granted by the Commission in favor of the United States on behalf of the large number of other claimants on which, according to said records, payments of approximately \$136,000,000 have heretofore been made. According to the records of the American Agency, all holders of awards of the Commission except the sabotage claimants have either received, pursuant to the provisions of the Settlement of War Claims Act of 1928, payment in full of their claims, together with interest to date of payment, or amounts equal to not less than approximately 100% of the principal amount of such awards. In the great majority of cases said holders of awards remaining unpaid have received more than the principal amount of said awards.

A report of the United States Senate Finance Committee, dated June 6, 1934 (Senate Report No. 1376, 73rd Cong., 2d Sess., p. 7), says:

"It will be noted that the funds now available to the German special deposit account amount to about \$20,000,000, which are being reserved to make payment on account of any awards which the Mixed Claims Commission might enter on the claims now pending before it. In case awards are entered on account of the claims now pending before the Commission, payments will be made in the same manner and to the same extent as payments have already been made on account of awards entered and certified for payment."

On June 6, 1934, the only claims pending before the Mixed Claims Commission were the sabotage claims and one other claim, which was also disposed of on October 30, 1939.

HAROLD H. MARTIN

Subscribed and sworn to before me this 28th day of November, 1939.

NORVELLE H. SANNEBECK
Notary Public.

(N. P. Seal)

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Exhibit 1

March 30, 1931.

Honorable Robert W. Bonyngé,
American Agent,
and

Dr. Wilhelm Tannenbergh,
German Agent,

before the Mixed Claims Commission, United States
and Germany,
Washington, D. C.

Gentlemen:

In the decision handed down today in the Sabotage Cases the Commission has decided the matter of rehearings in these cases so far as the rehearing petitions therein are based on allegations of obvious error. This decision is related to the record as it stood when the cases were decided, and the decision reserves the question of the proposed admission of new evidence, which is a separate question.

The Commission asks me to advise you that it desires the two Agents, without waiting for the presentation of any additional new evidence, to submit briefs discussing, first the jurisdictional considerations and legal principles which should govern the Commission's decision as to the admission of new evidence, in these cases, and, second, what kind of new evidence, if any, should be admitted.

The Commission in this connection points out that the two Agents have already presented some argument on the question of new evidence and each Agent has based his argument in part on the decision of the Commission in the Philadelphia-Girard National Bank case. To avoid further discussion as to the proper interpretation of the language used by the Commission in that case we think it best to

advise you that the National Commissioners are
103 agreed that it was the intention of the Commission in that decision to rule against the introduction of further evidence of any kind after the evidence had once been closed and a decision promulgated. This ruling is not irrevocable, but it is desirable that argument addressed to the question should be devoted not to the interpretation of that language but to the principle itself. The Commission has not seen the new evidence offered by the American Agent in the Sabotage Cases, but the descriptions of this evidence in his motions filed March 5 and 11, 1931, give the impression that the evidence offered is not new and is not of the character which courts admit after a decision is once made in cases where, after a decision, they admit any new evidence.

The Commission accordingly requests that the Agents file their briefs on the points above mentioned within two weeks, with leave to each Agent to file a reply brief within one week after the receipt of the other Agent's brief.

Very truly yours,

CHANDLER P. ANDERSON
American Commissioner.

Docket Nos. 8103, 8117 et al.

UNITED STATES OF AMERICA, on behalf of Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters, *Claimants*,

v.

GERMANY.

Preliminary Order on Petition for Rehearing.

A supplementary Petition for Rehearing these claims having been filed by the American Agent on July 1, 1931, and motions for leave to file certain evidence listed therein as Exhibits Nos. 873 to 907 having been filed by the American Agent on March 5 and 11 and July 1, 1931, which evidence has since been submitted for examination, and the Commission having made a preliminary examination of the Petition for Rehearing and the briefs and memoranda filed with reference thereto by the American Agent and the German Agent,

It is now ordered that the Joint Secretaries receive provisionally the evidence offered as aforesaid by the American Agent, but the Commission reserves for later decision the question of its right to admit new evidence and all other questions arising in connection with the aforesaid petition if the evidence be admitted.

The Commission is informed by the German Agent that he does not desire to present on behalf of his Government any rebuttal evidence, and on this understanding the Commission will hold a session at the office of the Umpire in Boston, Massachusetts, beginning on Thursday, July 30, at 10 o'clock a. m., to hear oral argument by the two Agents, which arguments shall be limited to the question of the admissibility of the evidence now offered and the question of its value and effect on the merits of these claims
105 in relation to the findings and conclusions of the Commission set forth in its original decision.

The Commission further orders that the Exhibits Nos. 904 and 905 (1) (2) and (3) of the above-mentioned evidence be delivered to the Umpire of the Commission for safe-

keeping with permission to either Agent or his duly authorized representative to have access thereto subject to the convenience of the Umpire.

Done at Boston July 28, 1931.

ROLAND W. BOYDEN

Umpire.

CHANDLER P. ANDERSON

American Commissioner.

W. KIESSELBACH

German Commissioner.

Countersigned:

WALTER R. DORSEY

American Joint Secretary

ALFRED LUDERS

German Joint Secretary

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Exhibit 3

Before the Mixed Claims Commission United States and
Germany,

Organized Under the Agreement of August 10, 1922,
Between the United States and Germany

Docket Nos. 8103, 8117, et al.

List Nos. 11,333, 4830, et al.

UNITED STATES OF AMERICA, on behalf of Lehigh Valley
Railroad Company, Agency of Canadian Car and
Foundry Company, Limited, Bethlehem Steel Com-
pany, et al., *Claimants,*

v.

GERMANY.

Petition for a Rehearing.

This petition for rehearing is filed upon the following grounds:

I. That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which mis-

led the Commission and unfairly prejudiced the cases of the claimants.

II. That there are certain witnesses within the territorial jurisdiction of the United States, including those hereinafter specifically named, who have knowledge of facts and can give evidence adequate to convince the Commission of the liability of Germany for the destruction of the Black Tom Terminal and the Kingsland plant, but whose testimony cannot be obtained without authority to issue subpoenas and to subject such witnesses to penalties for failure to testify fully and truthfully.

III. That the United States and the claimants are filing and will file evidence to show that the Commission 107 has been misled by the German evidence; and have considerable information of the same character which cannot be obtained in affidavit form without payments of money, the giving of which information by the witnesses should be compelled by process of law.

IV. That there has also come to light evidence of collusion between certain German and American witnesses of a most serious nature to defeat these claims.

A brief discussing this new evidence and certain of the other evidence will be filed.

By reason of the serious character of the issues raised by this petition, by the evidence filed, and by the very terms of the decisions of the Commission, the United States insists that opportunity be afforded for the subpoenaing of witnesses and documents. Among the witnesses within the territorial jurisdiction of the United States to whom the United States desires the issuance of subpoenas requiring them to testify, are the following:

- (1) *Theodore Wozniak*, in whose handwriting are the letters found by the Commission to have been spurious and who was Germany's chief witness for the defense, and whom Germany has failed to recall to the stand and has declined to permit the United States to call by subpoena following the discovery of the letters in his handwriting;
- (2) *Ivan Baran*, the recipient of the Wozniak letters;
- (3) and (4) *Frederick L. Herrmann* and *Paul G. L. Hilken*, the sender and recipient of the message in the Blue

Book Magazine of January 1917 which the Umpire found to be conclusive of the issues in these cases, if authentic, and who have not heretofore made full disclosures of facts within their knowledge.

In addition there are ten or more other witnesses
108 now in the United States having a knowledge of the facts bearing on the issues in these cases to whom it is desired to issue subpoenas.

The examination of the above named and other witnesses under subpoenas issued by some competent authority, is desired and is authorized (save for Germany's opposition) by the Act of Congress of July 3, 1930 (46 Stat. 1005). The issuance of such subpoenas, requiring these witnesses to testify under penalty of punishment for perjury is the only possible method of ascertaining the ultimate facts in the issues in these claims.

Particular attention is called in this connection to the Ordinance of Germany of June 28, 1923 for the execution of the Germany-American Agreement of August 10, 1922 (Reichsgesetzblatt 1923, Part II, p. 299), which was an Ordinance passed *subsequent to the date of the Agreement of August 10, 1922 creating the Mixed Claims Commission* and passed with express application thereto which permits the right to take testimony before the courts of Germany. Rights under this ordinance have been freely exercised by the German Agent in these very claims before this Commission, though the German Government through its Agent and Commissioner, have opposed and prevented the exercise of the rights conferred by the American statute respecting witnesses within the territorial jurisdiction of the United States upon the ground that the American statute was passed after the date of the agreement creating the Commission, and that the German Government had not consented to its application to the Commission. The German Ordinance was likewise enacted subsequent to the Agreement.

The Commission's decisions denying the request
109 of the United States to issue subpoenas and take oral testimony in the pending claims do not discriminate between the requests made by the United States (a) that subpoenas be issued requiring witnesses to testify,

and (b) that witnesses be heard orally before the Commission. Even if there should be adequate reasons upon grounds of "convenience" to justify the German Agent and his Government in declining to consent to the hearing of witnesses orally by the Commission, such reasons are not applicable to the refusal of the German Government to consent to the application to this Commission of the rights accorded by the Act of Congress of July 3, 1930, to require obdurate witnesses within the jurisdiction of the United States to be placed under oath and required to testify.

Even in claims involving comparatively non-controversial issues, the power to issue subpoenas has been freely granted respecting evidence to be offered before other commissions (See for example the Convention of January 11, 1909 between the United States and Great Britain, Malloy Vol. 3, p. 2607, and 36 State. p. 2448). Both Governments have attempted by statute to grant such power respecting evidence to be offered to this Commission (*supra*). Germany has prevented the United States on behalf of these claimants from exercising it.

The present status of the decision in these sabotage claims presents a pitiful anomaly. The Commission stands with its own unanimous finding of official authorization and promotion of sabotage on the neutral territory of the United States. Yet the Commission by the objections of the Germany Government has been compelled to admit that it has been unable to ascertain the facts essential to the
 110 determination of Germany's liability for the damages claimed in these cases.

Opinions are now recorded in these claims declaring that false documents and testimony have been submitted by witnesses on both sides, yet the Commission declares itself powerless owing to Germany's opposition, to subpoena a single one of those witnesses and make him testify again, or a single one of the other witnesses who must know the why and the wherefore of that evidence.

Such a situation—such an anomaly—in any international arbitration of such vital importance to two Governments as these cases are, is intolerable and unthinkable as a final result.

The United States and the claimants are not prepared to submit to the Commission finally the full evidence in support of this application for a rehearing nor to submit for action by the Commission this application for a rehearing, until it is ascertained definitely and finally whether such opportunity for subpoenaing witnesses can be accorded either by Germany's consent to the application of the present American statute, or by amendment to the present American statute, or by decision of this Commission. Certain proposed amendments to the American statute are pending before Congress, and others are under consideration.

As the Commission is aware, the argument at Washington in November, 1932, was heard at that time notwithstanding statements of the American Agent to the Commission that he did not believe it would be feasible to complete an exhaustive investigation of certain of the issues within the time allotted.

111 The argument terminated on November 25, 1932.

The National Commissioners filed a Certificate of Disagreement on November 28, 1932. The decision was rendered on December 3, 1932.

As the Commission is likewise aware, there were features of the testimony and documents offered by both sides—both by German witnesses and by American witnesses—which are declared in the opinions filed to have been tainted with fraud.

The United States and the claimants have deemed it their patent duty under such circumstances to continue their investigations of such evidence. Further investigations, therefore, have been and are being conducted both by the United States and by the private claimants, with the view to unearthing and determining the ultimate actual facts respecting that testimony and those documents. Those investigations are not yet completed and cannot be satisfactorily completed unless the Commission reverses its decision on the question of the right of the Commission to issue subpoenas or until authority is accorded either by the consent of Germany or through the processes proposed by measures which have been introduced into the Congress

of the United States and otherwise under consideration to require unwilling witnesses within the territorial jurisdiction of the United States to testify regarding the matters concerned.

It is believed that with power to subpoena witnesses, the Agent of the United States will be in a position to establish conclusively the authenticity of the message contained in the Blue Book Magazine of January 1917, which message, if authentic, the Commission has held to be conclusive of the issues in these cases.

In addition, it is believed that he will be able to establish the true facts and circumstances with respect to

(1) The so-called "Johnson Report" and other testimony submitted at the same time on behalf of Germany;

(2) The letters admittedly written by Wozniak, the German Agent's principal witness in the Kingsland case;

(3) The contemporaneous British Secret Service reports relative to Wozniak's identity as an agent, which are dated, and are now established to have been dated, prior to the date of the Kingsland fire;

(4) Hilken's payment of \$2,000. on August 10, 1916, to compensate the agents who had destroyed Black Tom (the evidence as to this, already persuasive, will be further fortified by evidence of statements by Kristoff himself as to his contemporaneous possession of the exact sum of \$2,000);

(5) The identity of Scott and Burns, formerly employed as detectives at Black Tom;

(6) The relationship of Hinsch to Thummel alias "Thorne", the employment officer at Kingsland, and to Hinsch's connection with Ahrendt.

WHEREFORE, this petition is filed for the reopening and rehearing of the decisions in these claims; the United States reserving the right to complete the evidence to be submitted in support hereof until such time as authority shall have been granted either by the application of the Act of Congress of July 3, 1930 or otherwise to issue subpoenas and to compel testimony under oath and under penalty of pun-

ishment for the furnishing of false testimony of witnesses including the witnesses hereinabove specified.

Respectfully submitted,

PEASLEE AND BRIGHAM

COUDERT BROTHERS

CRAVATH, DE GERSDORFF,
SWAINE & WOOD

RUMSEY & MORGAN

Counsel for Claimants.

Countersigned:

ROBERT W. BONYNGE

Agent of the United States.

H. H. MARTIN,

Of Counsel.

May 4, 1933.

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Exhibit 4

The Acting German Commissioner, Dr. Meyer, was unwilling to attend this meeting lest by so doing he should compromise the position of his Government on the question of the jurisdiction of the Commission, and it is understood by both the Umpire and the American Commissioner that his absence from this meeting is without prejudice to the interests of his Government.

Nevertheless in the absence of the German Commissioner and the substitute for the German Commissioner, the Commission will proceed with its meeting under the authority of the Order entered on April 21, 1930, signed by the Umpire and both National Commissioners, which reads as follows:

'Ordered that during the absence of the German Commissioner from the United States the Umpire and the American Commissioner be, and they are hereby, empowered from time to time to hold meetings (1) for the purpose of announcing and recording awards, dismissals, opinions, decisions, and orders approved in writing by the National Commissioners, (2) for the purpose of entering any order or orders which to the Umpire and American Commissioner may seem proper with respect to any administrative or

other matter or proceeding coming before the Commission, which decisions, opinions, awards, dismissals and orders shall in all things have the same force and effect as if the German Commissioner were present, participating, and concurring therein.

'Nothing herein contained shall be construed to limit or restrict the power of the Umpire to hold meetings of the Commission from time to time for the purpose of taking such action as to him may seem proper in connection with any case or point of difference certified to him by the National Commissioners.

'Ordered that the American Commissioner is hereby authorized and empowered to act for the Commission, in the absence of the German Commissioner, and also without requiring the participation of the Umpire, in calling meetings of the Commission in Washington, D. C., and announcing for record in the minutes of the Commission awards and dismissals of claims and orders of the Commission when the original or copies of such orders, dismissals and orders, signed or initialed by the German Commissioner to signify his concurrence in such action has been filed with the Joint Secretaries of the Commission or when he has notified them by letter or cable or radio communication of his concurrence therein, and also without the concurrence of the German Commissioner to announce orders on motions made by either Agent which are not opposed by the other, and the awards and dismissals and orders so announced shall have the full force and effect of final decisions and orders by the Commission.'

This meeting of the Commission is called pursuant to the request contained in the following communication from the Department of State to the American Agent which in compliance with the request contained therein, together with a letter dated October 11, 1933, inclosed therewith, from the German Embassy to the Secretary of State, is brought to the attention of the Commission:

Department of State
Washington

October 19, 1933.

The Honorable Robert W. Bonyngé,
Agent of the United States, Mixed Claims
Commission, United States and Germany,
Investment Building,
Washington, D. C.

Sir:

The Department encloses a copy of a note, dated October 11, 1933, received by it from the German Ambassador, stating that his Government considers petitions for rehearing to be in conflict with the provisions of paragraph 3, Article VI of the Agreement of August 10, 1922, between the United States and Germany, and that the Commission is without authority to pass upon a difference of opinion between the two Governments on this question. The Ambassador states that it is his understanding the same opinion is held by the German Commissioner, Dr. Kiesselbach.

It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself. It is understood that the American and German Commissioners hold divergent views on this question and that in a normal course of procedure, under the claims agreement and the rules of procedure adopted by the Commission, the matter would be submitted to the Umpire for decision.

It is desired that you promptly bring this communication and its enclosure to the attention of the American Commissioner or the full Commission, as in your judgment may seem proper, for the purpose of obtaining the decision of the Umpire on this disputed point.

Very truly yours,

For the Secretary of State:

William Phillips

Under Secretary

Enclosure:

Copy of note dated October 11, 1933,
from the German Ambassador

(Enclosure)

Translation

Deutsche Botschaft

Washington, D. C., Oct. 11, 1933

Mr. Secretary:—

Pursuant to yesterday's conference between a member of my staff and officials of your Department I have the honor to communicate to Your Excellency the following:

The German Government (as stated in the Embassy's note of July 6, 1933, and in my conversation on August 24, 1933, with the Acting Secretary of State, Mr. Wilbur J. Carr) considers petitions for rehearing in conflict with existing treaty provisions, as contained in paragraph 3, Art. VI of the agreement of August 10, 1922, between the United States and Germany. The German Government regards the commission as being without authority to pass upon a difference of opinion which may exist between the two governments in this connection.

Incidentally I understand this same opinion is held by the German Commissioner, Dr. Kiesselbach.

116 In February of this year Dr. Meyer, First Secretary of the Embassy, was named Acting German Commissioner for the sole purpose of expediting such formalities as would be found necessary for the conclusion of the commission's work. He has no authority to act with respect to the petitions offered by the American Agent in April and May of this year, but he is still authorized to participate in the formal conclusion of the compromise tentatively agreed upon in February, provided that the work of the Commission would be definitely closed.

Accept, Your Excellency, the renewed assurance of my highest consideration.

(sgd.) LUTHER

The Honorable

Cordell Hull

Secretary of State

of the United States of America

Washington, D. C.

This correspondence relates to only two petitions for rehearing: (1) The petition on behalf of the New York Fire

Insurance Company, as Successors to Norwegian Underwriters, Docket No. 3120, which petition was presented April 17, 1933; and (2) the petition in the so-called sabotage cases, Docket Nos. 8103, 8117, et al., which petition was presented May 4, 1933.

It is appropriate to state at this point, for the purpose of simplifying the discussion, that although the two national Commissioners have disagreed as to the jurisdiction of the Commission to reconsider the decision of the Commissioner in the sabotage cases, it does not appear that they have disagreed as to the action to be taken by them on the petition in the Underwriters claim, and the American Commissioner now states that if the German Commissioner considers that that petition should be dismissed on the merits he is prepared to agree with him in that respect.

It follows, therefore, that the question now under consideration relates solely to the action to be taken with reference to the sabotage cases.

It further appears, from this correspondence, that the Government of the United States considers that 'the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself', and desires that the Umpire of the Commission shall render a decision on this point.

117 The American Commissioner concurs with the view of the Government of the United States that this question of jurisdiction is one properly to be decided by the Commission itself, and that the Umpire is authorized to render the decision of the Commission on that point.

On the other hand, the German Government 'regards the Commission as being without authority to pass upon a difference of opinion which may exist between the two Governments in this connection.'

The American Commissioner regards this attitude of the German Government as an attempt to limit, without the consent of the Government of the United States, the jurisdiction conferred upon the Commission by the two Governments in their Agreement of August 10, 1922, in order to determine independently of the Commission, and on political or other considerations, questions submitted by virtue of that Agreement to the Commission for decision on purely legal grounds.

It also appears from the German Embassy's letter to the Secretary of State that the Acting German Commissioner, appointed as substitute for Dr. Kiesselbach, is acting under a very limited authority in that, as stated in that letter, he was named 'for the sole purpose of expediting such formalities as would be found necessary for the conclusion of the Commission's work', and 'has no authority to act with respect to the petitions offered by the American Agent in April and May of this year.' It further appears that so far as those petitions are concerned, Dr. Kiesselbach is still in full authority as the German Commissioner.

With reference to the procedure to be taken by the Commission in order to bring before the Umpire for decision the questions on which the two national Commissioners are in disagreement, the American Commissioner calls attention in the first place to the fact that the certification of these questions by a Certificate of Disagreement signed by the national Commissioners is purely a requirement of the rules of procedure adopted by the Commission for its own convenience, and, so far as the Agreement of August 10, 1922, under which the Commission was organized, is concerned, no Certificate of Disagreement is required in order to authorize the Umpire to decide questions of disagreement between the national Commissioners.

118 The requirement of the rules on this point is found in Rule VIII, which provides: '(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.'

In view of the fact, as now placed on record by the German Embassy's letter to the Secretary of State, that Dr. Kiesselbach is still the German Commissioner so far as the sabotage cases are concerned, and that the Acting Commissioner sitting as a substitute has no authority to sign a certificate of disagreement, and as Dr. Kiesselbach is in Germany and, accordingly, is not in a position to meet with the other members of the Commission, and as both Governments

have expressed themselves as desirous of having the work of the Commission brought to a conclusion as soon as possible, the American Commissioner is of the opinion that the rule as to the certification of questions of disagreement is broad enough to permit the certification of the question of disagreement in a less formal way than by a joint written certificate of disagreement, and that the Umpire may be called upon to act upon and decide questions of disagreement as to which either national Commissioner may certify to him that he is in disagreement with the other national Commissioner. In support of this view it must be recognized that this separate form of certification would be the only possible method of certification if the national Commissioners should find themselves unable to agree upon a form of joint certification, which might well happen in cases of serious dispute between them. Moreover, the requirement of the rule under consideration is of secondary importance, since, as above noted, no certification of any kind is required by the fundamental Agreement of August 10, 1922, which establishes the jurisdiction of the Commission.

It so happens that there can be no dispute or misunderstanding as to the questions upon which the two national Commissioners are now in disagreement, or the attitude of each Commissioner with respect to those questions.

119 In the first place, the Umpire made the following statement in his decision of December 3, 1932:

'A matter upon which the Commissioners disagree is that of the jurisdiction of the Commission ever under any circumstances or for any reason to reopen a claim made under the international agreement of August 10, 1922, which created the Commission, once that claim has been formally passed upon and decided. The German Commissioner's position is that while the two Commissioners by mutual agreement may reopen in such a situation they may not do so where, as here, one of the Commissioners opposes the reopening. The German Commissioner does so oppose in this case.'

Dr. Kiesselbach, the German Commissioner, concurred in that decision, thereby concurring in that statement.

In the second place, under date of May 5, 1933, Dr. Kiesselbach, as German Commissioner, wrote to the American Commissioner that his Government had advised him 'to

bring now the question of whether or not our Commission has the right to reopen to a final decision', and that he had prepared an opinion on this question which he had filed with the Umpire, reserving the right to amend it should the American Commissioner disagree with him, and prepare an opinion in opposition. He also requested the American Commissioner in that letter to prepare and send to him, with his opinion, a certificate of disagreement, which he could sign and return, together with his final opinion. This letter reads in full as follows:

Dr. Wilhelm Kiesselbach
President

Des Hanseatischen Oberlandesgerichts

Hamburg 36, May 5th, 1933.

My dear Mr. Anderson:

My Government informs me that its endeavours have failed to terminate the Commission's task by a compromise on the cases the reopening of which has been requested by the American Agent and advises me to bring now the question whether or not our Commission has the right to reopen to a final decision.

120 I therefore enclose a copy of my opinion on this question which I beg to consider as tentative in so far as I reserve the right to amend and supplement it if and when you disagree and should prepare also an opinion.

In order to expedite the matter I suggest that together with your opinion you send me the certificate of disagreement. Then I can sign and return it together with my final opinion.

In order to keep our Umpire au courant I have sent him a copy of my opinion and of this letter.

Very sincerely yours,

(Signed) W. KIESSELBACH

Mr. Chandler P. Anderson,
Mixed Claims Commission,
Investment Building,
Washington, D. C.

The American Commissioner wrote to Dr. Kiesselbach, in reply, under date of June 1st, advising him of the then

status of the negotiations which had been undertaken between the two Governments for the settlement of outstanding claims, and advised him that pending the outcome of those negotiations, and in order to expedite a conclusion, if occasion arises, 'I am preparing an opinion on the jurisdictional question which you have discussed in your opinion inclosed in your letter to me, and I will have it ready for submission to the Umpire if that question is to be certified to him. I do not understand why you reserved it from our certificate of disagreement in the sabotage cases last November.' A copy of that letter is in full as follows:

Washington, D. C., June 1, 1933.

Dr. Wilhelm Kiesselbach
President
Des Hanseat. Oberlandesgerichts,
Hamburg, Germany.

My dear Dr. Kiesselbach:

I have received your letter of May 5th, which was somewhat delayed in reaching me, and since then, owing to the temporary absence from Washington of the Under-
121 secretary of State, who has charge of the German claims negotiations with your Government, I have only recently been able to find out what is the present situation.

In your letter you state that your Government informs you that these negotiations have failed and, therefore, the questions of the Commission's right to reopen should be brought to a final decision.

Apparently there is some misunderstanding about the situation, as my Government informs me that arrangements for the settlement of all pending cases on an agreed basis are still under consideration.

As I understand our position, the two Governments, by undertaking these negotiations, have for the time being taken the disposition of these cases out of the hands of the Commission, and I do not feel at liberty to take action on any of these cases pending further instructions from my Government.

Meanwhile, however, in order to expedite a conclusion if occasion arises, I am preparing an opinion on the jurisdic-

tional question which you have discussed in your opinion inclosed in your letter to me, and I will have it ready for submission to the Umpire if that question is to be certified to him. I do not understand why you reserved it from our certificate of disagreement in the sabotage cases last November.

I note that you have sent to the Umpire a copy of your opinion, and I will do the same with mine when it is ready, and will also send a copy to you.

It is rather disappointing to have the closing stages of the Commission's work left in such a confused condition, after all the hard work which we have done, and the admirable results accomplished during the last ten years.

Very sincerely yours,

(Signed) CHANDLER P. ANDERSON

Since then the only communications exchanged between the two national Commissioners consist of two cablegrams reading as follows:

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Washington, June 17, 1933.

Dr. Wilhelm Kiesselbach

Aumuehle bei Hamburg Germany

With reference request in your letter, May five that I prepare certificate of disagreement about jurisdictional right to reconsider decisions, my Government, in view of diplomatic discussion with your Embassy here, is willing to have this question certified now to Umpire, provided it applies only to reconsidering sabotage cases. Under our practice hitherto followed this question has never been considered before the submission of the new evidence on which rehearing petitions rested and if the question is to be submitted to the Umpire before the new evidence is submitted in the sabotage cases my Government considers that your Government should agree that regardless of what the Umpire's decision may be the awards tentatively agreed upon in the other pending cases will be entered immediately and my Government will agree that no other rehearing petitions will be submitted except the Sabotage petitions if authorized by Umpire's decision.

Please cable if this suggestion satisfactory to you and your Government and I will then cable form of certificate of disagreement.

ANDERSON

June 23, 1933.

Chanderson
Washington

Must leave negotiations and decision to my Government.

KIESSELBACH.

These cablegrams relate to a situation then under diplomatic discussion concerning the settlement of all the pending cases, except the sabotage cases, by agreement directly between the two Governments, which negotiation is still pending, as shown by the letter of October 11, 1933, from the German Ambassador to the Secretary of State, which is quoted above. The American Commissioner considers that these cables do not change the situation developed by the letters of May 5 and June 1, above quoted, between the German Commissioner and the American Commissioner.

The situation developed by that correspondence has since remained unchanged so far as the national Commissioners are concerned. It may be noted, however, that the American Commissioner has not as yet filed with the Umpire his opinion on the disputed questions in opposition to the German Commissioner's opinion already filed with the Umpire, and, in compliance with the present attitude of the American Government, the American Commissioner now presents to the Umpire his opinion. Although, for the reasons above stated, the American Commissioner considers that the questions in dispute between the two national Commissioners are already sufficiently evidenced and defined in the record without any final certification to justify the Umpire in taking jurisdiction to decide upon them, under the authority conferred upon him by Article II of the Agreement of August 10, 1922, 'to decide upon any cases concerning which the Commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings', nevertheless, the Amer-

ican Commissioner, in order to fulfill what may be considered a technical requirement under the rules, has prepared, and now presents to the Umpire, a separate certificate of disagreement in writing, signed by him, together with a formal written request that he take action on the questions about which the two national Commissioners are in disagreement, as shown by the record and in their respective opinions, having first, however, given the German Commissioner an opportunity to revise his opinion after reading the opinion of the American Commissioner, which is being forwarded to the German Commissioner in accordance with the request made by him to that effect.

The American Commissioner thereupon handed to the Umpire the following communication.

October 31, 1933.

The Honorable Owen J. Roberts,
Umpire of the Mixed Claims Commission,
United States and Germany,
Washington, D. C.

Sir:

Pursuant to the statement made by me at the meeting of this Commission today (October 31, 1933), a copy of which is attached hereto, I have signed and hand to you herewith my written opinion and a certificate of disagreement concerning questions on which the German Commissioner and I are unable to agree, arising out of the pending petition for a rehearing presented to the Commission by the Government of the United States through its Agent on behalf of the claimants in the so-called sabotage claims.

On the basis of these documents and the record now before us concerning these claims, and in the exercise of the authority conferred on you by Article II of the Agreement of August 10, 1922, which authorizes you 'to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings', I hereby request that in

the circumstances you will proceed to render the decision of the Commission on the questions thus presented.

Respectfully yours,

CHANDLER P. ANDERSON
American Commissioner.

If the German Commissioner should revise the opinion already filed by him with the Umpire the American Commissioner may wish to revise or add to his opinion and reserves the right to do so if he so desires.

The Umpire thereupon said 'Let the record show that the Umpire has received the letter just read and the certificate of disagreement under the cover of that letter, and that in view of the statement of the American Commissioner that he is forwarding a copy of these papers to Dr. Kiesselbach in Germany I think I should take no action until a reasonable time has been afforded to Dr. Kiesselbach to advise me of any views he may have in the premises or to revise his opinion or supplement it in any way he sees fit.'

The Umpire announced that the following order has just been signed by the Umpire and the American Commissioner:

Ordered, That the certificate of disagreement dated October 31, 1933, signed by the American Commissioner, in Docket Nos. 8103, 8117, et al., the opinions of the German Commissioner and the American Commissioner respectively set out therein, and the statement made by the American Commissioner at the meeting of the Commission held this day, be placed in the records of the Commission.

Done at Washington October 31, 1933.

OWEN J. ROBERTS

Umpire

CHANDLER P. ANDERSON,

American Commissioner.

The Umpire inquired if the Agents had anything to submit in respect to the pending questions. The American Agent stated that he is willing to submit the questions thus raised as the record now stands, on the briefs and oral arguments heretofore had, but that he would desire an opportunity to submit further observations if the German Commissioner revises his opinion as heretofore filed.

The Umpire stated that it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Um-

pire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government before the Commission.

The American Commissioner stated, for the particular information of Dr. Johann G. Lohmann, German Agent, that he is this day sending by mail to the German Commissioner, Dr. Kiesselbach, in Germany, a copy of the statement he had made at this meeting and of the certificate of disagreement filed by him, and that a copy of the said documents would be furnished to the Acting German Commissioner and to the German Agent as soon after the adjournment of this meeting as possible.

There being no further business to be transacted at this meeting, the Commission, at 4:40 o'clock p. m., adjourned subject to call.

Approved:

OWEN J. ROBERTS
Umpire

CHANDLER P. ANDERSON
American Commissioner

ERNST W. MEYER
German Commissioner

Countersigned

WALTER R. DORSEY
American Joint Secretary

ALFRED LUDERS
German Joint Secretary.

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Exhibit 5

Decision of the Commission, dated December 15, 1933.

(Same as Exhibit I to Intervener's Answer, filed November 22, 1939.)

The German Agent stated that there had just been an exchange of notes between the German Ambassador and the Secretary of State, and handed a copy of each of the notes to the Commission. The American Commissioner directed that the copies be spread on the Minutes of this meeting. They are as follows:

Translation
Washington, D. C.
May 7, 1934.

Mr. Secretary:

Pursuant to my note of March 3rd I have the honor to inform Your Excellency with reference to Your esteemed Note of February 20, 1934,—462 11 W 892/2412—that following Your Excellency's suggestion all cases which were pending before the Mixed Claims Commission, United States and Germany, have been disposed of, with the exception of claims registered in Docket Nos. 8103, 8117, 8231-8296, 8361-8363, 8371-8450, 8467, 14901, and Docket Nos. 4712 and 11485.

Concerning the claim of Mrs. Catherine McNider Drier, Docket No. 11485, I beg to inform Your Excellency that the German Government prefers to have this matter left pending before the Commission for the time being, as the German Government has recently been advised that the material submitted by Mrs. McNider Drier, on the basis of which the Commission granted her an award of \$250,000 plus interest in 1929, appears to be not beyond suspicion. An investigation has been started accordingly which will take a little time for its conclusion.

I should be grateful to Your Excellency if you would advise me that the American Government agrees with the German Government that the Mixed Claims Commission, United States and Germany, shall not be asked in the future to consider new cases or cases already decided, excepting the sabotage cases registered in Docket Nos. 8103, 8117, 8231-8296, 8361-8363, 8371-8450, 8467, 14901, and the claim of Mrs. Catherine McNider Drier, registered in Docket Nos. 4712 and 11485.

Please accept, Your Excellency, the renewed assurances of my highest consideration.

(Signed) LUTHER

The Honorable Cordell Hull,
Secretary of State
of the United States of America,
Washington, D. C.

May 7, 1934.

Excellency:

I have received your note of May 7, 1934, informing me that, following the suggestion contained in my note of February 20, 1934, all cases that were pending before the Mixed Claims Commission, United States and Germany, have been disposed of, with the exception of the sabotage claims registered in Docket Nos. 8103, 8117, 8231 to 8296, both inclusive, 8361, 8362, 8363, 8371 to 8450, both inclusive, 8467 and 14901; and the claim of Mrs. Katherine McNider Drier, Docket Nos. 4712 and 11485.

As to the claim of Mrs. Katherine McNider Drier, covered by Docket Nos. 4712 and 11485, you state that your Government prefers to leave this matter before the Commission for the time being, as the German Government has recently been advised that the material submitted by Mrs. Drier, on the basis of which the Commission granted her an additional award of \$250,000 plus interest in 1929, appears to be not beyond suspicion; that an investigation has accordingly been started which will require a little time for completion; and that the case should be left for later decision, as are the so-called sabotage cases.

I regret that the German Government is unwilling to have this case closed along with the other cases on which agreements were reached by the two agents in February of last year. The claim was the subject of discussion between the American and German Agents and counsel for the claimant at various times, and on February 27, 1933, an additional amount of \$160,000 was agreed upon. The German Agent, so I am informed, stated that he could not give his final approval to the settlement until he had con-

sulted his Government. It appears that later, namely, on March 1, he informed the American Agent that his Government had approved the settlement, and this information was conveyed to counsel for the claimant.

Since that time the claim has been included in the list of claims on which tentative settlements had been reached, and prior to the receipt of your note of May 7, 1934, no condition was stated, except that the work of the Commission be promptly closed. The present correspondence is calculated to limit the work of the Commission so as to bring its work to an end at the earliest practicable date. The failure to settle this claim in accordance with the understanding reached more than a year ago is placing the claimant and this Government in an embarrassing position, since both had relied upon the agreement reached and had considered the case as definitely settled, save for the formal consummation of the arrangement.

If the case is left before the Commission, it will be necessary to give the claimant time to marshal additional evidence to combat any evidence that the German Government may submit, which will mean that the completion of the work of the Commission will be indefinitely postponed. The amount involved is comparatively small.

It is therefore hoped that on further consideration your Government will deem it desirable to give finality to the settlement heretofore reached in the Drier case.

I agree with Your Excellency that the Commission shall not in future be asked to consider any new cases or cases already decided, other than the sabotage cases and the case of Mrs. Katherine McNider Drier.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) CORDELL HULL

His Excellency
Herr Hans Luther,
Ambassador of Germany.

The German Agent, in response to an inquiry of the American Agent, stated that he has at present no statement to make concerning the so-called Sabotage Cases or

the Drier case, but he expects to make communications regarding these cases within the next few days.

There being no further business to be transacted at this meeting, the Commission, at 12:10 o'clock p. m., adjourned subject to call.

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Exhibit 7.

Before the Mixed Claims Commission United States and Germany

Docket Nos. 8103, 8117, et al.

UNITED STATES OF AMERICA on behalf of LEHIGH VALLEY RAILROAD, ET AL.

Decision of the Commission

Reference is made to the decision of this Commission dated December 3d, 1932, in which the Umpire held that "if the new evidence" (submitted to him at the time in order to impugn the decision of this Commission rendered at the Hague under the date of October 16th, 1930) "were formally placed on file and considered in connection with the whole body of evidence submitted prior to the Commission's Opinion of October 16th 1930, the findings then made and the conclusions then reached would not be reversed or materially modified."

Against this Decision and the Decision rendered at the Hague October 16, 1930, the petition for a rehearing now under consideration is directed. Its allegations are, *inter alia*, that before the case was pleaded at Washington the then German Commissioner brought it to the knowledge of the Commission that according to information received by him Claimants had obtained a report from one of their experts the contents of which were adverse to the genuineness of the main documents on which they relied but were withholding such report from the Commission. As to the actual happenings the Umpire has stated during the argument of these cases:

"I have known Mr. Albert S. Osborn for many years. When I was in practice I retained him in connection with several problems arising with respect to documents whose authenticity was contested. At some time he referred me

to Mr. Elbridge W. Stein as a competent expert in similar matters. Mr. Stein, at that time, had an office in the Bulletin Building, Philadelphia. On one or more occasions I consulted him.

"Just before the date set for hearing in the sabotage cases (probably some time in November 1932), Mr. Stein attempted to get into communication with me by telephone. He wished an interview with me concerning the sabotage cases in which I knew he was a witness for the claimants. I refused to allow him to communicate with me.

131 "During the meetings of the Commission preliminary to the hearing, Dr. Kiesselbach advised Mr. Anderson and me that the claimants had suppressed an expert report adverse to the authenticity of the Wozniak letters and the Herrmann message. I cannot say that Dr. Kiesselbach specifically stated the source of his information.

"The communication naturally disturbed me but I knew of no action that the Commission or I, as Umpire, could take in the premises and so stated.

"My impression that there had been some such suppression was strengthened by Mr. Osborn's statement, in one of his affidavits, that it was remarkable that no opinion by Mr. Stein, a competent expert in such matters, had been submitted as to the age of the documents but only an opinion as to handwriting, a matter that was uncontested.

"In the oral argument the German Agent made no reference to this matter and as the American Agent did not refer to it the impression remained that there had been a withholding of a report which might have shed light on the question argued before the Commission."

In addition this Commission states through its Members present at the time that there can be no doubt as to the entire good faith of the then German Commissioner when he made his communication. The Umpire and the American Commissioner hold, that Claimants have shown, that there was no sufficient ground for suspicion, and that for this reason Claimants are entitled to a reconsideration. The German Commissioner, whilst doubting that the Claimants were actually wronged (especially as in his view mere suspicions never can be a basic element of juridical findings)

takes the stand, that in international arbitration it is of equal importance that justice *be done* and that *appearances show clearly* to everybody's conviction that justice was done. He does not think that the second requirement was satisfactorily complied with in the present case, and for this reason, he accedes to the conclusion of the other members of this Commission. It is therefore decided, that the Decision of this Commission rendered at Washington on the third of December 1932 be set aside. This decision reinstates the cases into the position they were before the Washington Decision was given. It has no bearing on the Decision rendered at the Hague and does not reopen the cases as far as that decision is concerned. Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits. Both parties are entitled to file evidence (and to exchange briefs) as well in the proceedings in which a ruling for a reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted: Evidence filed and briefs submitted in the proceedings, in which a reopening is sought, must remain within the limitations set by the Commission's Decision dated December 15, 1933.

Done at Washington, June 3, 1936.

OWEN J. ROBERTS

Umpire

CHANDLER P. ANDERSON

American Commissioner

DR. VICTOR L. F. H. HUECKING

German Commissioner.

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Exhibit 8.

Mixed Claims Commission United States and Germany.
Docket No. 8103, 8117, et al.

UNITED STATES OF AMERICA on behalf of LEHIGH VALLEY
RAILROAD COMPANY, Agency of CANADIAN CAR AND
FOUNDRY COMPANY, LIMITED, BETHLEHEM STEEL COM-
PANY, ET AL.)

V.

GERMANY

*Motion of the German Agent Concerning an Adjournment
of the Meeting of the Commission of June 17th, 1936.*

Acting upon instruction which he has just received from
his Government the German Agent has the honor to ask
this Honorable Commission to postpone for a period of
two months the meeting of the Commission which has been
fixed for Wednesday, June 17th, 1936.

The American Agent has been furnished with a copy of
this Motion.

Respectfully submitted

RICHARD PAULIG

German Agent

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Exhibit 9

Before the Mixed Claims Commission,
United States and Germany,

Organized Under the Agreement of August 10, 1922
Between the United States and Germany.

Docket Nos. 8103, 8117, et al.

UNITED STATES OF AMERICA On behalf of LEHIGH VALLEY
RAILROAD COMPANY, Agency of CANADIAN CAR & FOUN-
DRY COMPANY, LIMITED, and VARIOUS UNDERWRITERS,
Claimants,

V.

GERMANY.

*Reply of the American Agent to the Motion of the German
Agent Filed This Day Asking for an Adjournment for
a Period of Two Months of the Meeting of the Com-
mission That has Been Fixed for June 17, 1936.*

The American Agent has been advised by his Govern-
ment that officials of the German Government have indi-

cated that the German Government is desirous of discussing with representatives of this Government the question of a settlement of the sabotage claims, Docket Nos. 8103, 8117, et al.

The American Agent therefore joins with the German Agent in the Motion as filed.

A copy of this Reply has been furnished the German Agent.

Respectfully submitted,

ROBERT W. BONYNGE
American Agent

H. H. MARTIN
*Counsel and Assistant to the
American Agent.*

June 16, 1936.

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Exhibit 10

Before the Mixed Claims Commission
United States and Germany

Organized under the Agreement of August 10, 1922
between the United States and Germany.

Docket Nos. 8103, 8117, et al.

UNITED STATES OF AMERICA on behalf of LEHIGH VALLEY
RAILROAD COMPANY, Agency of CANADIAN CAR AND
FOUNDRY COMPANY, LIMITED, BETHLEHEM STEEL COM-
PANY, ET AL. *Claimants*

VS.

GERMANY

Decision of the Commission

The American Agent has filed a motion that an order be entered "to the effect that the Commission does not desire to take submission of these claims, until all evidence that either Government desires to have considered *in support of or in opposition to the pending petition for rehearing has been filed* in order that the Commission may, when it takes submission, enter an order finally disposing of these claims on their merits, and that the order further advise the Agents of the two Governments accordingly."

The German Agent opposes the making of such an order. The Commissioners have certified their disagreement as to the action to be taken.

The proceedings leading up to the filing on May 4, 1933, of a petition by the American Agent for a rehearing of these cases are sufficiently outlined in the decision of December 15, 1933. The present motion has to do solely with the procedure appropriate under that petition for rehearing. After the American Agent had petitioned for a rehearing, the German Agent challenged the power of the Commission to act upon it. This question of power had been raised in earlier stages of the case, but as shown by the decision of December 15, 1933, had been reserved. The

136 contention of the German Agent required the Commission squarely to meet that question. This it did in its decision of December 15, 1933. The conclusion was that no power was vested in the Commission to reopen a case merely for after discovered evidence; but that, where, as in the present instance, the assertion is made that fraud has been perpetrated upon the Commission, power exists to examine the facts and to act in accordance with the findings consequent upon such examination. Nothing more was decided on December 15, 1933. At the time of that decision the German Agent had not answered the petition nor offered evidence. The American Agent had offered evidence intended to support the allegations of the petition. What was said at the close of the opinion was based upon the assumption that the claimants could effectively support the allegations of their petition. Thereafter the German Agent filed an answer denying those allegations.

By the petition and answer an issue was framed. This issue may be stated thus: "Was the Commission misled by fraud practiced upon it?" If that issue be decided in favor of the claimants, the Commission should reopen the case upon the merits and reexamine the conclusions reached in the light of the whole record, including the proofs offered to impeach evidence forming part of the record when its decision on the merits was rendered. Obviously the case is not reopened by the presentation of a petition praying for such action. Especially is this true where the allegations of the petition are categorically denied. This the American Agent concedes. The decision

of November 4, 1934, so recognizes. It is there said: "The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer."

The first step is the determination whether the claimant's assertions as to fraud, et cetera, are made out. To ascertain this the evidence in support of those assertions must be examined. Necessarily, such examination will include a reference to evidence in the record prior to the Commission's decision on the merits. Such reference will be necessary for comparison between the old evidence and the new, and to show the bearing and meaning of the proofs tendered upon the issue of fraud and collusion. On this preliminary matter, namely, whether the case shall be opened and a rehearing had upon the merits, it will not be necessary to argue the cases on the merits. If the claimants prevail upon that preliminary question, the former decisions will be laid aside and the merits reexamined in the light of all the evidence, including that tendered on the issue of fraud and collusion. If they fail, reconsideration of the Commission's decisions on the merits of the claims will be unnecessary and indeed improper. The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing.

It is, of course, conceivable that the Commission should hear argument on both the propriety of reopening the case and the merits at one and the same time. Much may be said pro and con such a procedure. Nevertheless, I suppose that if the parties were in agreement that this course should be followed, the Commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening vel non, and not upon the merits.

138 It is earnestly urged that the Agents agree at once to limit the time for rebuttal by the United States of the proofs offered by Germany in opposition to the petition for rehearing, and confer with the Commission as to the fixing of a time for argument and for the filing of briefs on that issue.

I attach hereto the certificate of disagreement by the National Commissioners, together with their separate opinions and supplemental opinions attached thereto.

Done at Washington July 29th, 1935.

OWEN J. ROBERTS

Umpire.

Exhibit 11

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Deutsches Mitglied
der

Mixed Claims Commission

1439 Massachusetts Avenue
Washington, D. C.
March 1, 1939.

The German Commissioner
Mixed Claims Commission

My dear Mr. Justice Roberts:

I beg to apprise you of the fact that I retire from the post of German Member of the Mixed Claims Commission. Please consider running appointments as cancelled.

The reasons for my step are these:

Our deliberations began with discussing whether there was a prima facie case made out by the claimants and at once one fact became conspicuous: In respect to the largest of our claims you introduced as your main point a point which was not made by the claimants at all and which, as far as I am aware, never was argued. It may be recapitulated in a few sentences:

When our Commission rendered their decision at the Hague, they had before them two American witnesses and one German witness testifying to the central question. Our Commission did not believe the American witnesses and said so; neither did they believe the German witnesses, and they said so. In the reopening pleadings the testimony of

the German witness is impugned by the claimants and the point which the claimants really make is: Had the Commission at that time known to what extent the German witness had been untruthful, then they would not have denied credence to the American witnesses with whom he was in contradiction. This point is logically impeccable, as I always have admitted; it makes the issue dependent on factual considerations which I always have been ready to consider. Instead of this point you introduced a totally different point (without being able by the way to substantiate it by any international or even municipal decision) which enables you to dispense with any factual consideration at all: You assume that although the Commission denied credence to the German witness they were still decisively influenced by the fact that he came forward at all. And actually this consideration was for you the decisive one regarding the question of the prima facie case which we were then discussing, for what other reasons you advanced for your attitude did not relate to the largest case before us, so that in this case the reason indicated was your only reason.

The grave irregularity created by your procedure was twofold. Fresh points introduced in as late a stage as the deliberations of the Court after the Argument make the other party defenseless. No opportunity is accorded to the defendants to show what they have to say against your views, and they may have to say a great deal.

But the other point is of still greater weight. I cannot shut my eyes to the fact that in my opinion it is not compatible with the position of an Umpire and it shows a bias if the Umpire makes points and bases his decisions on them which are not advanced by the party favored by them. The Umpire actually assumes by such a procedure the attitude of a legal adviser for the favored party and does so under circumstances under which the other side can no longer expect equal justice.

The grave situation with which I felt myself confronted (especially when all my attempts to show you what I have just explained were of no avail at all) made it my duty to consider whether I could still cooperate in what was going on and what was to my mind no longer a really judicial procedure. It was perfectly clear to me that I was under

a serious responsibility not to act hastily and to thoroughly consider the attitude which I had to take. But what accompanied the events described by me and what followed them in the next days only corroborated my original impression. My conviction that you had no longer an open mind deepened. I could not overlook certain points as, for instance, this: A very fully substantiated factual German argument on a certain point was discarded by you solely on the ground that "It merely was a clever piece of advocacy"; when I insisted what your reason was to discard it so summarily, you gave a factual reason which I could show at once to be erroneous. Instead of now reconsidering your attitude, your answer merely was in an impatient voice "You may be quite sure that I do not care in the least for all that." But this instance obviously was only a symptom. It has become clear to me during these days that any argument advanced by the claimants at once

attracts your attention and evokes the idea How
142 could it be corroborated? And any argument advanced in favor of the defendants at once evokes in you the idea, How can it be refuted? As you told the American Commissioner and me, in many respects this case has been a disillusion to you and this has left a strong emotional feeling with you. I cannot be but afraid that this emotional feeling carries you away when I see to what extent the responsibility of German advocates and witnesses is stressed by you whilst on the other hand you find no way to put in the balance what under the same hearing may be alleged against the other side.

The result to which I have come is that it is impossible for me to cooperate in a procedure which no longer offers to both parties equally the usual guarantees of a decision arrived at in a really judicial way. Our charter allows any member of the Commission to retire and this is the consequence which I have drawn.

Faithfully yours,

(Sgd.) DR. VICTOR L. F. H. HUECKING

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Exhibit 12

March 2, 1939.

Dr. Victor L. F. H. Huecking,
c/o German Embassy,
1439 Massachusetts Avenue, N. W.
Washington, D. C.

My dear Dr. Huecking:

I have your letter of March 1, 1939, advising that you are retiring from the post of German member of the Mixed Claims Commission.

I do not propose to enter into any controversy with respect to the statements contained in your letter other than to say that they are unjustified and, in my opinion, present a wholly false picture of our deliberations with respect to the motion pending before the Commission.

Yours sincerely,

(sgd.) OWEN J. ROBERTS,
Umpire.

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Exhibit 13

1439 Massachusetts Avenue
Washington, D. C.
March 1, 1939.

Deutsches Mitglied
der
Mixed Claims Commission

The German Commissioner
Mixed Claims Commission

Dear Colonel Garnett:

Under even date I am sending a letter to Mr. Justice Roberts in which I apprise him of my retirement from the post of German Member of the Mixed Claims Commission.

I know that this step comes at a moment when our deliberations are still in an absolutely preliminary state and at a time when any question of possible agreement or disagreement is necessarily still in the remote distance, but it

was just the continuation of our deliberations under the present conditions which I had to object to.

Please consider running appointments as cancelled.

Faithfully yours,

(s) DR. VICTOR L. F. H. HUECKING

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Exhibit 14

The American Commissioner
Mixed Claims Commission.
United States and Germany
Department of State
Washington, D. C.

March 3, 1939

Dr. Victor L. F. H. Huecking
c/o German Embassy
1439 Massachusetts Avenue
Washington, D. C.

Dear Dr. Huecking:

This will acknowledge receipt of your letter of March 1, 1939, in which you inform me that you have sent a letter to Mr. Justice Roberts, apprising him of your retirement from the post of German Member of the Mixed Claims Commission.

In your letter you state that this step has come at a moment when our deliberations are still in an absolutely preliminary state and at a time when any question of possible agreement or disagreement is still in the remote distance. I feel it my duty to say that this statement is not in accordance with my understanding of the situation.

It developed at these conferences that I had come to the definite conclusion that the decision at Hamburg had been reached upon false and fraudulent evidence, and in this conclusion you refused to concur. This point of difference had been clearly brought out.

I am sure you will recall that, after several conferences had been held, the Umpire expressed himself in agreement with me, and we both informed you of our conviction
146 tion that the decision at Hamburg had been reached upon false and fraudulent evidence, and that the proof of fraud was sufficient to set aside that decision and

to reopen the case. Thereupon you argued that if, upon an examination of the whole case, both the new evidence and the old, the Commission came to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before the Hague, the present position would have to be dismissed. You then urged upon the Umpire and myself that we should consider the whole evidence for that purpose. It was thereupon agreed that we would proceed to examine the whole record to determine whether, upon the whole record, the American case had been proven. It was while we were examining this question that your action was taken.

I cannot let the record stand as stated in your letter.

Very truly yours,

(s) CHRISTOPHER B. GARNETT
American Commissioner.

CBG/AEC

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Exhibit 15

The American Commissioner
Mixed Claims Commission
United States and Germany
Department of State
Washington, D. C.

March 3, 1939.

Honorable Cordell Hull
Secretary of State
Washington, D. C.

Dear Sir:

I have the honor to submit to you a report of the action of Dr. Victor L. F. H. Huecking, German Commissioner, Mixed Claims Commission, United States and Germany, announcing his retirement from the post as German Commissioner.

Under date of March 1, 1939, Dr. Huecking sent to Mr. Justice Roberts, the Umpire, a letter announcing his retirement. A copy of that letter is attached hereto, together with a copy of Mr. Justice Roberts' reply.

Under the same date, March 1, 1939, Dr. Huecking forwarded to me a letter apprising me of the fact that he had

sent the aforesaid letter to Mr. Justice Roberts. I am attaching hereto a copy of Dr. Huecking's letter and of my reply thereto.

I think it proper to give you the recent history of this case. The primary question now before the Commission is whether the decision which was reached at Hamburg, October 16, 1930, was induced by fraudulent and collusive evidence. In considering this question, the Commission has been operating under the decision of the Umpire rendered December 15, 1933. In order to reach a conclusion, it has been necessary for the Commission to take into consideration, not only the evidence filed since the Hamburg decision, but also the evidence filed theretofore. The whole record covers between thirty and forty thousand pages, and of this, the evidence filed since the decision at Hamburg covers about fifty per cent.

The taking of evidence on this case was closed on the 14th day of January, 1939, and very voluminous briefs have been filed on both sides on every feature of the case. After extensive arguments covering twelve days, the case was submitted to the Commission on the 27th day of January, 1939.

After about two weeks had elapsed, the Umpire and the Commissioners began their conferences, and these conferences continued, but not on consecutive days, until Tuesday, February 28, 1939, when the last conference was held. Another conference was scheduled to be held on Thursday, March 2, 1939, at the office of the Umpire. Shortly before the time for the conference the letters from Dr. Huecking were delivered to the Umpire and myself, respectively.

As will be indicated clearly by my reply to Dr. Huecking's letter, the subject of these conferences was whether the evidence which had been adduced had proven fraud which was sufficient to set aside the decision at Hamburg.

During these conferences, I expressed to the Umpire and the German Commissioner my opinion that the decision at Hamburg had been reached on false and fraudulent evidence and that the proof of fraud was sufficient to set aside the Hamburg decision and reopen the case.

After the conference had extended for a considerable time, the Umpire expressed himself in entire agreement

with me on this proposition. Thereupon the German Commissioner argued that, if upon an examination of the whole record both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, the petition would have to be dismissed, and he urged upon the Umpire and myself that we should consider the whole evidence for that purpose. We thereupon proceeded to examine the whole record to determine from that record whether the American case had been proven. It was while the Commission was engaged in examining this question that Dr. Huecking's action in regard to his retirement was taken.

Very respectfully submitted,

(s) CHRISTOPHER B. GARNETT,
American Commissioner.

CBG/AEC

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Exhibit 16

1439 Mass. Ave., N. W.
Washington, D. C.
June 10, 1939.

Mixed Claims Commission
United States and Germany
German Agency
Mr. Walter R. Dorsey,
American Joint Secretary,
Mixed Claims Commission,
United States and Germany,
Washington, D. C.

Dear Mr. Dorsey:—

With reference to the "Notice of meeting," dated June 7, 1939, in which you inform me by direction of the American Commissioner that "a meeting of the Mixed Claims Commission, United States and Germany, will be held on Thursday, June 15th, 1939, at 11:00 o'clock a. m., in the large conference room of the United States Supreme Court Building," I hereby advise you that in view of the note ad-

dressed by my Government to the Department of State today, I shall not appear at the meeting.

Very truly yours,

(s) RICHARD PAULIG,
German Agent.

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Exhibit 17

Washington, D. C., June 10, 1939.

Mr. Walter Dorsey
American Joint Secretary
Mixed Claims Commission
United States and Germany
Washington, D. C.

My dear Mr. Dorsey:

Your notice of meeting of June 7, 1939, addressed to Dr. Victor Huecking, was referred to me since, as the former Commissioner's secretary, I still take care of his mail.

Enclosed herewith I am returning your letter because, as you know, Dr. Huecking resigned as member of the Commission at the beginning of March and left Washington shortly thereafter.

Yours very truly,

(s) FRIEDA VON MEGEN.

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Exhibit 18

(Translation)

German Embassy

Washington, D. C.,
June 10, 1939.

Mr. Secretary of State:

I have the honor to advise Your Excellency of the following:

As the German Agent on the German-American Mixed Commission reports, a written notice from the American Secretary of the Commission, according to which the Commission will hold a meeting at 11 a.m. on June 15th in the large conference room of the United States Supreme Court Building, was received by him on June 7th of this year.

By direction of my Government, I call attention to the fact that since the withdrawal of the German Commis-

sioner, Dr. Victor Huecking, on March 1st of this year, of which I notified the American Government by a note to Your Excellency of March 24th of this year, the Commission has been incompetent to make decisions and that consequently there is no legal basis for a meeting of the Commission at this stage. By direction of my Government, I advise you that the Government of the Reich will ignore the decision to call the meeting on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure.

Accept, Mr. Secretary of State, the renewed assurance of my most distinguished consideration.

THOMSEN.

His Excellency

Mr. Cordell Hull,

Secretary of State of the United States,
Washington, D. C.

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Exhibit 19

Docket Nos. 8103, 8117, et al.

UNITED STATES OF AMERICA On behalf of Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters,

Claimants,

v.

GERMANY.

Certificate of Disagreement and Opinion of the American Commissioner

These cases originated out of two disasters,—the first, the destruction at Black Tom, N. J., on July 29-30, 1916; the second, the fire at Kingsland, N. J., on January 11, 1917.

In these disasters millions of dollars worth of property was destroyed, and, in the case of Black Tom, at least two lives were lost.

The Memorials of the United States were filed in March, 1927, and therefore the cases have been pending before the Commission more than twelve years.

The present status of these claims is as follows:

The American Agent on the 4th day of May, 1933, filed a petition for rehearing and reconsideration of the decision at Hamburg, dated the 16th day of October, 1930, on the ground that it was induced by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The purpose of the petition is fully set out in the following language in the decision of the
154 Umpire at Washington, December 15, 1933 (Report of American Commissioner dated December 15, 1933, pp. 75, 76):

"Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimants' cases; that certain witnesses, including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision was erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered.

"The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

"I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand."

On the 2nd day of May, 1935, the American Agent filed a Motion, asking that an Order be entered

155 "to the effect that the Commission does not desire to take submission of these claims until all evidence that either Government desires to have considered in support of or in opposition to the pending petition for rehearing has been filed in order that the Commission may, when it takes submission, enter an order finally disposing of these claims on their merits and that the Order further advise the Agents of the two Governments accordingly."

The German Agent opposed the making of such an Order, and, in the decision of July 29, 1935, denying the Motion, the Commission, by the Umpire, said (p. 2):

"By the petition and answer an issue was framed. This issue may be stated thus: 'Was the Commission misled by fraud practiced upon it?' If that issue be decided in favor of the claimants, the Commission should reopen the case upon the merits and reexamine the conclusions reached in the light of the whole record, including the proofs offered to impeach evidence forming part of the record when its decision on the merits was rendered. Obviously the case is not reopened by the presentation of a petition praying for such action. Especially is this true where the allegations of the petition are categorically denied. This the American Agent concedes. The decision of November 4, 1934,¹ so recognizes. It is there said: 'The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer.'"

In the course of his opinion the Umpire also said (p. 3):

"* * * If the claimants prevail upon that preliminary question (the right to reopen) the former decisions will be laid aside and the merits reexamined in the light of all the evidence, including that tendered on the issue of fraud and collusion. *"

¹ Announced November 9, 1934.

"It is, of course, conceivable that the Commission should hear argument on both the propriety of reopening the case and the merits at one and the same time. Much may be said pro and con such a procedure. Nevertheless, I suppose that if the parties were in agreement that this course should be followed, the Commission would acquiesce. There is no such agreement. Germany insists that the preliminary
156 question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issue made by their petition. The next hearing, therefore, will be upon the question of reopening vel non, and not upon the merits."

Following this decision, additional evidence and exhaustive briefs were filed on behalf of each Government. Oral arguments were then had on May 12 to 29, 1936. The Commission on June 3, 1936, handed down a unanimous decision, setting aside the decision of December 2, 1932, and restoring the claims to the position they were in before that decision was rendered. In the course of its decision the Commission said:

"Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, *unless Germany shall agree to a different course*, must, under the Commission's decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits." (Emphasis supplied.)

That Germany, following the decision of June 3, 1936, did elect to follow "a different course", is evidenced by the fact that the German Agent exercised the right given him in the Order of the Commission of December 1, 1937, reading as follows:

"that the German Agent may not only file the documents called for under Rule 4 (of the Special Rules, under Order of March 20, 1929), but may submit, if he desires, further evidence."

The same Order provided that:

"The German Agent shall file with the Commission
157 any other evidence (in addition to that called for

under Rule 4) he desires to file on or before March 1, 1938, and not thereafter.

Pursuant to this Order, the German Agent did file a considerable amount of evidence other than that called for under Rule 4 of the Special Rules, his last evidence being filed on January 14, 1939.

During the past twelve years, thousands of pages of evidence, consisting of official documents from the files of various Government Departments, affidavits, examinations of witnesses under the Act of July 3, 1930, (46 Stat. 1005) and under the Act of June 7, 1933, (48 Stat. 117) and other instruments have been filed and during that period, voluminous briefs were filed by each side and lengthy oral arguments heard, covering the various features of the cases.

The cases were closed on January 14, 1939, and each Agent has filed exhaustive briefs covering a full discussion, not only of the questions raised by the petition of May 4, 1933, but likewise arguing the cases on the merits. The American Agent filed his briefs on September 13, and December 5, 1938. The German Agent filed his briefs on November 16, 1938, and January 12, and 14, 1939. After exhaustive oral arguments by distinguished counsel extending through twelve days, the cases were finally submitted to the Commission on the 27th day of January, 1939.

After about two weeks had elapsed, the Umpire and the Commissioners began their conferences. These conferences continued, but not on consecutive days, until Tuesday, February 28, 1939, when the last conference was held. Another conference was scheduled to be held on Thursday, 158 March 2, 1939, at the office of the Umpire. Shortly before the time for the conference, a letter from the German Commissioner, announcing his retirement, was delivered to the Umpire and a similar letter was delivered to the American Commissioner. These letters and the replies thereto have been made matters of record.

The subject of these conferences, in their early stages, was whether the evidence which had been adduced had proven fraud sufficient in character to set aside the decision at Hamburg.

In the course of these conferences, the American Commissioner expressed to the Umpire and to the German Commissioner his opinion that the decision at Hamburg had been

reached on false and fraudulent evidence and that the proof of fraud was sufficient to set aside the Hamburg decision and reopen the cases.

After the conferences had continued for a considerable time, the Umpire expressed himself in entire agreement with the American Commissioner on the question of fraud. Thereupon the German Commissioner argued that, if, upon an examination of the whole record, both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, it would be necessary to dismiss the petition, and he urged upon the Umpire and the American Commissioner the necessity of considering the whole evidence for that purpose.

159 It was thereupon agreed that the whole record should be examined to determine whether the American case had been proven or not, and it was while the Commission was engaged in examining this question that the letters aforesaid of the German Commissioner were received.

As was indicated clearly in the Umpire's reply, the letter to the Umpire presented a wholly false picture of the deliberations of the Commission. The effort of the German Commissioner to justify his retirement, by attributing bias to the Umpire, will receive, as it deserves, the disapprobation of every right-thinking person.

Certificate of Disagreement

Under these circumstances, I deem it my duty as American Commissioner to certify, and I do hereby certify, to the Umpire that, in both of the cases now under consideration by the Commission, there was a disagreement between the American Commissioner and the German Commissioner on all material points before the Commission, and particularly on the point as to whether the evidence which has been adduced had established fraud sufficient in character to justify the Commission in setting aside the decision at Hamburg.

I further certify that at the time when the German Commissioner retired, the Commission was, at his instance, considering the question whether the American Agent had proven his case, and, more particularly, whether the Herrmann message was an authentic instrument; and with this,

my certificate, I am submitting my opinion with respect to said cases and the points of difference certified, and I respectfully ask that this opinion be filed as a part of the record in this case

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I. Jurisdiction

There have been spread upon the minutes of the Commission the letter of the German Commissioner, addressed to the Umpire, announcing his retirement from the post of German Member of the Mixed Claims Commission; the Umpire's reply thereto; the letter of the German Commissioner to the American Commissioner apprizing him of his retirement; the American Commissioner's reply thereto, and the letter of the American Commissioner to the Secretary of State, notifying the Secretary of State of the German Commissioner's retirement and the status of this case at the time of the retirement of the German Commissioner.

Although the German Commissioner announced his retirement on March 1, 1939, and more than three months expired, the German Government has failed to follow the procedure prescribed by the Agreement of August 10, 1922, for filling the vacancy.

Under the circumstances set out above and in the letters spread upon the minutes, the question which is now before the Commission for its decision is, whether the Commission, acting through the Umpire and the American Commissioner, has the power to proceed with the cases and to decide whether the evidence which has been adduced has proven fraud sufficient in character to set aside the decision at Hamburg; and, second, whether upon an examination of the whole record, the American Agent has failed to prove his case.

Or, to put the question in a different form, did the retirement of the German Commissioner on March 1, 1939, render the Commission *functus officio* and deprive the Commission of the power to decide the questions at issue?

In order to examine and decide this question, it is necessary to refer to the pertinent provisions of the Treaty of Berlin; the Agreement of August 10, 1922, between the two Governments, under which this Commission was organized, and the Rules of Procedure adopted by the Commission.

Under the Treaty of Berlin it was provided, in section 5, of the Joint Resolution of Congress, approved by the President July 2, 1921, and incorporated in said Treaty, as follows:

"All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said Government (s respectively), of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, * * * since July 31, 1914, loss, damage, or injury to their persons or property, or directly or indirectly, * * * or in consequence of hostilities or of any operations of war, or otherwise."

Under the Agreement of August 10, 1922, between the United States and Germany, the preamble states that the two Governments,

162 "being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1931, * * * have resolved to submit the questions for decision to a mixed commission".

Article II of said Agreement reads as follows:

"The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same

procedure shall be followed for filling the vacancy as was followed in appointing him."

Under this Agreement, the Mixed Claims Commission, United States and Germany, was constituted and was authorized to pass upon three categories of claims set out in said Agreement, and has decided many cases involving millions of dollars.

The purpose for which the Commission was created is to determine the amount to be paid by Germany in satisfaction of Germany's obligations under the Treaty of Berlin to satisfy all claims against Germany of all persons who owe permanent allegiance to the United States and who have suffered through the acts of the Imperial German Government, or its agents, loss, damage or injury to their persons or property, directly or indirectly.

As indicated above, the German Commissioner retired on March 1, 1939, and although more than three 163 months have expired, Germany has not followed the procedure provided by the Agreement of August 10, 1922, for filling the vacancy.

Article VI of the Agreement of August 10, 1922, contains the following:

"The decisions of the commission and those of the Umpire (in case there may be any) shall be accepted as final and binding upon the two Governments."

Article VI(d) of the Rules of Procedure reads as follows:

"(d) When a case is submitted in pursuance of the foregoing provisions, the proceedings before the Commission in that case shall be deemed closed, unless opened by order of the Commission."

Article VIII, of the Rules of Procedure adopted by the Commission, reads as follows:

"Decisions.

"(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.

"(b) The Umpire shall at all times have the right to the complete record in any and all cases and to hear oral argument in his discretion.

"(c) The Umpire may join with the two National Commissioners in announcing—or in the event of their disagreement certified to him shall announce—principles and rules of decision applicable to a group or groups of cases for the guidance as far as applicable of the American Agent, the German Agent, and their respective counsel, in the preparation and presentation of all claims.

164 "(d) All decisions shall be in writing and signed by (1) the Umpire and the two National Commissioners or (2) by the two National Commissioners, where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based."

On March 20, 1929, the Commission entered an order providing additional rules governing the sabotage cases, reading as follows "(Report of the American Agent, 1934 p. 177):

"IT IS ORDERED BY THE COMMISSION that special additional rules applicable to this group of 'sabotage cases' are adopted as follows:

"(1) The Umpire will sit with the National Commissioners throughout the argument.

"(2) Each member of the Commission will carefully consider the entire record and the points and arguments put forward in the briefs whether the Agents and counsel refer thereto in their oral arguments or not. This will enable counsel for both sides to confine their arguments to those points which they believe to be most essential without incurring the risk of waiving a point not mentioned on the oral argument but considered relevant by any member of the Commission.

"(3) If any member of the Commission considers a point not orally argued one which should be taken into account in the Commission's decision, counsel's attention will be called thereto during the progress of the argument or subsequent thereto, and counsel for both parties will be given an opportunity to discuss same on the oral argument or to file

written or printed briefs within a time to be fixed by the Commission covering such particular point or points.

"(4) Where either party has for lack of time or other reason (other than a lack of diligence by such party) failed to produce evidence in rebuttal of that filed by the other party, and in the opinion of any member of the Commission such evidence in rebuttal is material; or where in the opinion of any member of the Commission further evidence on any point should be presented to aid the Commission in reaching a sound decision, the Commission will, within the time to be fixed by it, give the party or parties an opportunity to prepare and file such additional evidence. Where such additional evidence is not strictly in rebuttal the adverse party will be given a reasonable opportunity, within a time to be fixed by the Commission, to file evidence in rebuttal thereof.

"(5) Where, under orders of the Commission, evidence is filed during the progress of the oral argument or subsequent thereto, both parties will be given an opportunity, within a time to be fixed by the Commission, for the filing of written or printed supplementary briefs dealing with the evidence so filed."

Ever since these additional rules were adopted, the Commission has functioned in the sabotage cases as an arbitration body with three members, and the Umpire has sat with the two National Commissioners at each hearing, both during the examination of witnesses and the argument of counsel and has participated in the opinions.

By the very terms of the Agreement of August 10, 1922 and by the express terms of Article VIII of the Rules of Procedure, "any cases concerning which the Commissioners may disagree" and "any points of difference" may be decided by the concurrence of the two Commissioners, or by the concurrence of the Umpire and one National Commissioner.

Thus it appears that, under the organic law by which the Commission was created, and under its own Rules of Procedure, unanimity is not required, and the concurrence of only two is necessary for a decision, and this has been the practice ever since the Commission started functioning.

After the Hamburg decision was announced, that decision was attacked by the American Agent on

the ground that it was irregularly rendered, because the Umpire participated in the deliberations of the National Commissioners and in the opinion of the Commission.

On March 30, 1931, the Commission, in a unanimous opinion, answered this ground of attack as follows:

"This question is raised by the American Agent's claim that the decision was irregularly rendered because the Umpire participated in the deliberations of the National Commissioners and in the opinion of the Commission. The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, a practice never before questioned and not in our judgment of doubtful validity even if it had not so long been accepted by all concerned."

Thus, both before the special additional rules were adopted and after they were adopted, the Umpire has participated in the deliberations of the Commissioners and in the opinions of the Commission.

Under the organic law governing the procedure of the Commission, that is to say, the Treaty of Berlin, the Agreement of August 10, 1922, and the Rules of Procedure adopted by the Commission, and under the practice which has obtained, since the Commission was established, is it possible, after a case has been submitted to the Commission, and the two National Commissioners are in disagreement as to the direct issue before the Commission, for one National Commissioner to retire and prevent a decision by the remaining members of the Commission?

If it be possible for one National Commissioner, 167 whether under the express order or with the tacit consent of his Government, thus to bring to naught and render worthless the work resulting from the expenditure of thousands of dollars and years of careful research, and thus to defeat the very purpose for which the Commission was constituted under the Treaty of Berlin, such a result would make a mockery of international arbitration.

A somewhat similar case is the case of Republic of Colombia v. Cauca (1903), 190 U. S. 524 (modifying and affirming s. c., 113 Fed. 1020; s. c. 106 Fed. 337).

In that case the Republic of Colombia brought a suit in equity in the Circuit Court for the District of West Virginia against the Cauca Company and the Colombian Construction and Improvement Company, two corporations organized under the laws of the State of West Virginia. The purpose of the bill was to obtain a decree canceling an award made by two of three arbitrators, acting under an agreement of arbitration between the Republic of Colombia and the Cauca Company in connection with a contract for the construction of the Cauca Railway. The award was signed by two of the three arbitrators and was in favor of the Cauca Company for a large sum of money. One of the grounds for claiming that the award was invalid was because it was signed by only two of the three arbitrators.

It was alleged in the bill of complaint (U. S. S. C. Transcripts of Record, p. 28165) as follows:

168 "That in and by such Agreement (of Arbitration) it was provided in Article 6, that should any of the members of the commission decline to act or resign from the commission or for any reason cease to act, the proceedings of the commissions should not thereby be invalidated, but the commission should be *restored* by a new appointment which was to be made, by the party who appointed the member who failed to act, within thirty days, counting from the date on which said failure to act should occur. If such party should not comply with such obligation, the Secretary of State of the United States of America and the Minister of Colombia at Washington should proceed by agreement to appoint a person to fill the vacancy."

It was further alleged that, after the Commissioners were duly appointed, they held thirty-four sessions, and at the 35th session "the Commission was notified by Manuel H. Pena, the Commissioner named by the Minister of the Treasury of complainant, that he had resigned to the said Minister of the Treasury who had appointed him, the office of Commissioner, and he transmitted to the other commissioners, through its secretary, a copy of his letter of resignation addressed to the said minister; that the said resignation was the independent act of the said commissioner—not done by the order of, or with the knowledge of the complainant, the Republic of Colombia, which only had

knowledge of it after the resignation, which was to take effect from its date, was actually transmitted to the Minister of the Treasury of this complainant."

It was further alleged that no request had been made by the defendant or either member of the commission or the complainant, or any member of its government, or its representative in the United States, to restore the commission

by filling the vacancy; that notwithstanding the 169 the voluntary retirement and resignation of Pena,

the remaining members, without any notice to the complainant or anyone representing it, and without request or opportunity for restoring the commission by the appointment of a third member, but immediately, on the same day that said Pena resigned, assembled together and assumed to continue the functions of said commission in the absence of Pena, and finally formulated a pretended decision or award; that the commission, after the retirement and resignation of Pena, was wholly incompetent in law to proceed further or to make any decision or award, or to do any other matter until the commission had been restored in accordance with Article six of the agreement under which the commission existed, that is to say, by the appointment by the complainant of another person in his place and stead.

It was further alleged that the two remaining members of the commission, in disregard of their duty of fairness and impartiality, misconducted themselves in the last two sessions; that one of the arbitrators was guilty of misconduct as an arbitrator; that the two commissioners received wholly incompetent evidence.

One of the prayers was, that the pretended award promulgated by the two commissioners might be decreed to be utterly null and void and of no effect.

Honorable Nathan B. Goff, Judge of the Circuit Court of the District of West Virginia, heard the case and wrote the opinion. After stating the facts upon which the suit

was founded, he described the terms of the agree- 170 ment by which the arbitration was effected (106 Fed.

337, 342). He then described the organization of the commission and stated (106 Fed. 343):

"The Commission decided at its second meeting . . . that all of its decisions should be by majority vote of the

members, and at its third session it was resolved that, in case of disagreement between the members of the commission, the chairman should decide the question at issue."

In summarizing the action taken by the sessions of the Commission, Judge Goff says (106 Fed. 344):

"At its thirtieth session, * * * the Commission commenced the consideration of the testimony—oral arguments and briefs of counsel having been made and filed—for the purpose of formulating its award."

Then follows a description of the awards in certain sums for different purposes.

And then Judge Goff states (106 Fed. 344):

"At the meeting of the Commission held on October 19, 1897, it was moved to award the company as interest on the cost of physical construction to January 26, 1897, the sum of \$48,668.18, and the questions relating thereto were discussed, but the vote thereon was postponed. * * * The meeting was the thirty-fourth of the Commission, and all the members of the same were present, as they had been at all previous meetings; all the members had heard the testimony and the arguments, and all had taken part in the discussion and deliberations relating thereto, * * *"

At the thirty-fifth session, Pena did not appear, but he caused to be presented his letter of resignation. In his letter to the Minister of the Republic of Colombia he based his determination to resign upon the declared intention of the other two members of the Commission to allow the Cauca Company large amounts for the alleged expenditures having no relation to either construction expenses or the purchase of material, and, therefore, Pena claimed that the Commission had no jurisdiction to pass upon or allow such expenditures; and, further, that the Commissioners had departed from the terms of the convention and proposed to act wholly beyond their official powers. Therefore he expressed his intention to refuse to act further as a commissioner and to decline to remain a member of the Commission until the illegal intentions of the Commission should have been carried out. (106 Fed. 345).

The two remaining Commissioners met and passed a resolution setting out a short history of the resignation of Pena and the failure of the Republic of Colombia to

appoint a successor, then it was resolved that the Commission should proceed forthwith to make its award and formulate its decision as to the matters involved in the convention.

After setting out the above facts, Judge Goff formulated the question involved in the following language (106 Fed. 347):

"Is the award defective because only signed by two of the three arbitrators?"

In discussing this question it was held that a unanimous decision was not required in express words, and that in a case of this character it should not be implied, and that,

172 if Pena had not tendered his resignation and had he been present at the session when the award was made and had he then entered his dissent, still the award would have been binding on the parties unless some other good cause could have been shown to render it void.

Then Judge Goff said (p. 348):

"In addition to this, I think that the submission was in the nature of a public contention; that the compromise and adjustment of the same through the medium of the commissioners was based on a public law,—an act of the congress of the republic of Colombia; and that, therefore, under the well-established rule applicable to such controversies, the decision of the majority will conclude the minority, and their act will be the judgment of the whole number appointed. The dispute was, at least, brought to an issue by an act of the congress of the republic of Colombia, by which the franchise of the railway claimed by the Cauca Company was in effect forfeited. The submission was evidently the result of the friendly suggestions emanating from the secretary of state of the United States, and conveyed to the government of the republic of Colombia through the minister of the United States residing at Bogota. The third member of the commission was chosen, not by the parties nor by the commissioners appointed by them, but by the representatives of the governments of the republic of Colombia and of the United States. The original concession to Cherry recognized the enterprise he was authorized to carry out to be of public utility, and conceded to him all the rights usual under such circumstances. In such cases, unless there is a special provision

to the contrary, unanimity in reaching a decision is not required of the commissioners. Co. Litt. 181a; Grindley v. Barker, 1 Bos. & P. 236; Ex parte Rogers, 7 Cow. 526."

In later discussing the question as to whether there really was a vacancy or not, Judge Goff said, (p. 348):

"Clearly, it was not the intention of the parties to the convention that the existence of the commission should be destroyed by a resignation of the character of that presented by Commissioner Pena. It would be an impeachment of the common honesty of the parties to the
173 agreement, and a travesty on their evidently honorable intentions, to hold that they designed it should thus be in the power of one man—actuated by, to say the least, not commendable motives—to render worthless the work resulting from the expenditure of thousands of dollars and months of careful research, in an effort to amicably adjust an unfortunate controversy, that was rapidly reaching the point of embarrassment because of its national and diplomatic character. The testimony forces me to the conclusion that Commissioner Pena's only motive in withdrawing from the Commission was to prevent, if possible, a conclusion from being reached, or to render the award invalid should one be made. This conduct—keeping in view all the circumstances surrounding him and the commission of which he was still a member—was not only reprehensible in character, but was fraudulent in its tendencies."

As in the *Cauca Case*, so in the *sabotage cases*, one is impelled to the conclusion that the German Commissioner's only motive for retiring from the Commission was to prevent, if possible, a conclusion from being reached, or to render the award invalid should one be made.

This case was carried to the Circuit Court of Appeals for the Fourth Circuit and in a *per curiam* decision, that Court said (113 Fed. 1020):

"We have carefully considered the opinion of the Circuit Court, the subject matter of appeal in these two cases. We can add nothing to the clear statement of the facts of the case made by the learned judge who delivered the opinion of the court (106 Fed. 337), and we can add nothing to the reasons which led him to his conclusion, in which conclusion we entirely concur. The decree of the Circuit Court is affirmed."

When the case came before the Supreme Court of the United States (190 U. S. 524), that Court reversed the case as to the amount of the award that had been granted but affirmed it in other respects. The decision of the 174 Court on the question as to the necessity of a unanimous vote is set out in the second syllabus, as follows:

"Where the parties to a controversy have submitted the matter to a commission of three who have the power to, and do resolve that all decisions shall be by majority vote, an award by a majority is sufficient and effective."

The decision on the question of the power of one party to an arbitration or dispute to defeat the operation of the submission after receiving benefits thereunder by withdrawing, or by adopting the withdrawal of its nominee, is thus stated in the third syllabus of the case:

"In an arbitration between a sovereign state and a railroad company and affecting public concerns, whatever might be the technical rules for arbitrators dealing with a private dispute, neither party can defeat the operation of the submission after receiving benefits thereunder, by withdrawing, or by adopting the withdrawal of its nominee, after the discussions have been closed."

Mr. Justice Holmes, after stating the facts leading up to the arbitration agreement, related the terms of the arbitration agreement and discussed the effect of the resignation of one of the arbitrators as follows:

"The essential features of the agreement were that the company by the second article surrendered the railroad, and that Colombia agreed to pay a just indemnity, the scope of which will be considered later, and which was to be determined by the commission. The commission consisted of three—one appointed on behalf of Colombia, one on behalf of the company and the third by agreement between the Secretary of State of this country and the Colombian Minister at Washington. The Commission spoken of in the agreement in the singular, was to determine the procedure to be followed in the exercise of the power conferred upon it, 175 both as to its own acts and as to the proceedings, of the parties.' In pursuance of this power it resolved that all decisions should be by majority vote. There-

after the case was tried, and several items were allowed to the company which it was contended by the representatives of Colombia were not within the scope of the submission. At the end of the trial, when hardly anything remained to be done except to sign the award, the questions remaining open concerning only matters of interest which have been disallowed, the Colombian commissioner announced his resignation to the commission.

"The agreement gave Colombia thirty days to appoint a new member, and on its failure the Secretary of State for the United States and the Colombian Minister were to appoint him. But the Commission was allowed only one hundred and fifty days 'from its installation,' which might be extended sixty days more for justifiable grounds. It had sat two hundred and three days when the resignation was announced. Manifestly it was possible, if not certain, that its only way of saving the proceedings from coming to naught was to ignore the communication and to proceed to the award. This it did. Colombia by its bill and argument now lays hold of the resignation of its commissioner as a ground for declaring the award void.

"Colombia thus is put in the position of seeking to defeat the award after it has received the railroad in controversy and while it is undisputed that an appreciable part of the consideration awarded ought to be paid to the company under the terms of the submission. It is fair to add that the bill offers to pay the undisputed sum, but not to rescind the submission and return the railroad. We shall spend little argument upon this part of the case. Of course, it was not expected that a commission made up as this was would be unanimous. The commission was dealt with as a unit, as a kind of court, in the submission. It was constituted after, if not as the result of diplomatic discussion in pursuance of a public statute of Colombia. It was to decide between a sovereign State and a railroad, declared by a law of Colombia to be a work of public utility. In short, it was dealing with matters of public concern. It had itself resolved, under the powers given to it in the agreement, that a majority vote should govern. Obviously that was the only possible way, as each party appointed a representative of its side. We are satisfied that an award by a majority was sufficient and

effective. We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed. See *Cooley v. O'Connor*, 12 Wall. 391, 399; *Kings-ton v. Kincaid*, 1 Wash. C. C. 448; *Exparte Rogers*, 7 Cowen, 526; *Carpenter v. Wood*, 1 Met. 409; *Maynard v. Frederick*, 7 Cush. 247; *Kunckle v. Kunckle*, 1 Dall. 364; *Cumberland v. North Yarmouth*, 4 Greenl. 459, 468; *Grindley v. Barker*, 1 Bos. & P. 229, 236; *Dalling v. Matthecht*, Willes, 215, 217. In private matters the courts are open if arbitration fails, but in this case the alternative was a resort to diplomatic demand."

As has already been shown in this opinion, it was not contemplated by the organic law under which this Commission has operated that the decisions should be unanimous. On the contrary, it is perfectly apparent that in no case it has been necessary to have the concurrence of more than two members of the Commission. It is also perfectly clear that the United States was under no obligation whatever to return the property which had been seized, but in a spirit of generosity it provided in the Treaty of Berlin that this property should be held as collateral security to pay the claims of American nationals who had suffered loss in persons or property at the hands of the German Government or its agents. *Cummins v. Deutsche Bank*, 300 U. S. 115, 122-125; *United States v. White Dental Co.*, 274 U. S. 398.

Under the War Claims of 1928 (45 Stat. 254-279), 80% of the German enemy property at that time remaining was immediately returned to its former owners. The German Government, therefore, is in no position to contend that the act of its Commissioner in resigning can have the effect of preventing the remaining members of the Commission from passing upon the question at issue when he retired.

177 The case of *Colombia v. Cauca Co.* again came before the Supreme Court of the United States in 195 U. S. 604, where it was held that nothing in the former decree prohibited the Circuit Court from allowing interest on the amount of the items allowed. In the last case (195 U. S.

604), the Court again affirmed its action in modifying the action of the Circuit Court only in respect to the amount allowed.

In *Atchison, T. & S. F. Ry. Co. v. Brotherhood of L. F. and E.*, 26 Fed. (2d) 413, there was an arbitration under the Railway Labor Act (45 U. S. C. A., secs. 151-163). It was held by the Circuit Court of Appeals, Second Circuit that an award by a majority of the members of an arbitration board appointed pursuant to provisions of the act, before expiration of time provided in agreement for entering an award, was valid, notwithstanding the refusal of certain members to participate therein, on the ground that the board had previously filed a report showing an inability to reach an agreement.

In reaching its decision, Evans, Circuit Judge, laid down the following proposition (p. 417):

"Equally well settled is the rule that one arbitrator or a minority of arbitrators cannot, after the dispute has been fully submitted to the Board, defeat an award by resigning, withdrawing, or otherwise refusing to participate in the hearings. *Colombia v. Cauca Co.*, *supra*. Such a resignation or withdrawal shortly before the time fixed for the expiration of the arbitration; constitutes a fraud and, as such, defeats its purpose."

Text writers on international law seem to approve the principle of the *Cauca case*, which was followed in 178 the case last cited, namely, that one arbitrator, or a minority of arbitrators, cannot, after the dispute has been fully submitted, defeat an award by withdrawal or by adopting the withdrawal of its nominee, or by otherwise refusing to participate in the hearings after the discussions have been closed.

Witenberg, *L'Organisation Judiciaire la Procedure et la Sentence Internationales*, 1937, states the rule thus:

"24. In the calculation of majority all members of the tribunal must be counted, including those who might refuse to take part in the voting. These latter must be considered as having voted against the decision of the majority of the judges present and a report of their refusal shall be drawn up." (p. 281) (Translation from the French).

Merignhac has the following to say in his *Traite Theorique et Practique de L'Arbitrage International* (pp. 276-77):

"If one or more of the arbitrators refuse to take part in the deliberations, M. Calvo feels that they should be replaced; and in case this is impossible the tribunal should be dissolved. The Institute of International Law has decided with sound reason in Article 21* of its rules that the majority suffices for judgment in the hypothesis we have spoken of. It is, in effect, impossible to admit that one arbiter by bad faith, perversity, or simple negligence can paralyze the action of the tribunal."

179 Calvo, to whom Merignhac refers, has said:

"When the arbitral tribunal is composed of several members certain publicists are of the opinion that the absence of one of them prevents all valuable deliberation and decision even though the other arbitrators would form the majority and would agree, for the reason that the missing member might modify the decision of the others by the exposition of his own opinion.

"However Sir Robert Phillimore takes the view that if the absence of one of them is intentional or the result of intrigue the other members have the power to continue the procedure. As far as we are concerned we think that in such a case the proof being made of the unwillingness of the missing member it would be necessary to replace him or otherwise dissolve the arbitral tribunal as would be done in the case of the death of one of the members unless special provisions are prescribed in the original compromise for such eventuality." (Sec. 768, *Le Droit International Theorique et Pratique*, Vol. III, 5th edition, Charles Calvo, Argentine).

Whether Calvo would apply this rule in a case like the instant case, where the presentation of testimony had been closed, briefs filed and arguments completed, may be doubtful; but in any event his views appear not to have the support of the other text writers.

*Article 21 as follows:

"Every final or provisional decision shall be made by a majority of all the arbitrators named, even when one or more of the arbitrators refuse to take part therein."

Sir Robert Phillimore, to whom Calvo refers, says:

"If there be an uneven number of arbitrators the opinion of the majority would, according to the reason of the thing and the *Jus communis* of the nations be conclusive. If one of the arbitrators were maliciously absent himself it might be competent for the others to proceed; but if one were dead, the arbitration would be dissolved, unless provision had been made for the contingency in the original covenant." (*Commentaries upon International Law*, London, Vol. III, p. 4)

In commercial arbitration cases the trend of authorities seems to be in accord with the rule laid down in the *Republic of Colombia v. Cauca*, 190 U. S. 524, and 180 followed in the case of *Atchison, T. & S.F. Ry. Co. v. Brotherhood of L. F. and E.*, 26 Fed. (2d) 413. See *Burtlet v. Smith*, 94 Eng. Rep. 587 (King's Bench); *Dalling v. Matchett*, 125 Eng. Rep. 1138; *Widder v. Buffalo & Lake Huron Ry. Co.*, 24 U. C. R. 222 (Canada 1865); *Carpenter v. Wood*, 42 Mass. (1 Metc.) 409 (1840); *American Eagle Fire Ins. Co. v. N. J. Ins. Co.*, 240 N. Y. 398, 148 N. E. 562; *State v. Tucker*, 166 N. W. 820 (N. D. 1918); *Toledo S. S. Co. v. Zenith Transp. Co.*, 184 Fed. 391 (9CA 6th 1911).

5 Corpus Juris, p. 100, sec. 218, treating the subject "Refusal of Some of the Arbitrators to Participate after Disagreement" lays down the rule as follows:

"The refusal of one or a minority of a number of arbitrators, having authority to render a majority award, to proceed further with the hearing or discussion of the case, after a disagreement has arisen, does not divest the majority of power to proceed, in the absence of the minority, with the hearing and to render an award in accordance with their authority."

citing, among others: *Kingston v. Kincaid*, 14 F. Cas No. 7,321, 1 Wash. C. C. 448; *Witz v. Tregallas*, 82 Md. 351, 33 A. 718; *Sperry v. Ricker*, 4 Allen 17; *Maynard v. Frederick*, 7 Cush., 247; *Carpenter v. Wood*, 1 Metc. 409; *Dodge v. Brennan*, 59 N. H. 138; *Atterbury v. Columbia College Trustees*, 66 Misc. 273, 123 N. Y. S. 35; *Zorkowski v. Astor*, 13 Misc. 507, 34 N. Y. S. 948 (aff. 156 N. Y. 393, 50 N. E. 983); *Batley v. Button*, 13 Johns. 187; *Matter of Young*,

13 C. B. 623, 76 E. C. L. 623 138 Reprint 1344; *White v. Sharp*, 1 C. & K. 346, 47 E. C. L. 348; *Goodman v. Sayers*, 2 Jac. & W. 249 37 Reprint 622. See also Corpus 181. *Juris Secundum*, p. 206.

As we have already seen, these cases have been pending for more than twelve years. Thousands of pages of evidence, consisting of original documents from the files of the various government departments, affidavits, examinations of witnesses, and other instruments have been filed during that period; large sums of money have been spent in procuring this evidence and producing it before the Commission. It has been an enormous work, involving labor of many persons—experts, technicians and lawyers. The cases have been argued before the Commission on six different occasions by eminent counsel. Learned and exhaustive briefs have been filed, entailing great labor on the part of those who composed them; and every phase of the case has been fully discussed, both in written briefs and orally. The oral arguments have consumed a period of about sixty days.

On the pending petition, the cases were closed for filing of evidence and briefs on January 14, 1939.

After exhaustive oral arguments by distinguished counsel, extending through twelve days, the cases were finally submitted to the Commission on the 27th day of January, 1939. After about two weeks had elapsed, the Umpire and the Commissioners began their conferences. These conferences continued, but not on consecutive days, until Tuesday, February 28, 1939, when the last conference with the German Commissioner was held. Another conference was scheduled to be held on Thursday, March 2, 1939, at the offices of the Umpire. Shortly before the time for
182 the conference, the letters of the German Commissioner announcing his retirement were delivered to the Umpire and the American Commissioner, respectively.

As is clearly indicated by the letter which was written by the American Commissioner to the Secretary of State, the American Commissioner and the German Commissioner were in direct disagreement as to the issues before the Commission, that is to say, as to whether the record established fraud of a sufficient character to set aside the

decision at Hamburg, and, at the instance of the German Commissioner, the Commission was examining the record to determine whether the American Agent had proven his case, and specifically whether the Herrmann message was genuine, when the German Commissioner announced his retirement.

Under the circumstances set out above, to hold that one National Commissioner could, by his voluntary retirement, whether authorized by his Government or not, prevent the Commission from further proceeding with the cases, and especially from deciding the questions at issue when the German Commissioner announced his retirement, would defeat the purpose of the two Governments in establishing this Commission, would deprive the American Nationals in these cases of the remedy provided by the Treaty of Berlin and the Agreement of August 10, 1922, for American Nationals with claims against the German Government recognized by that treaty, and would raise many questions difficult of solution, as to the disposition of the funds
 183 now remaining in the Treasury of the United States, pursuant to the Settlement of War Claims Act.

Accordingly, I am of the opinion that the retirement of the German Commissioner on March 1, 1939, did not render the Commission *functus officio* and did not deprive the Commission of the power to decide the questions at issue at the time of his retirement.

Since the above opinion on jurisdiction was prepared, the American Commissioner has been furnished with a copy of a translation of a note from the German Embassy to the Secretary of State dated June 10, 1939, in which the German Embassy notifies the Secretary of State that, since the withdrawal of the German Commissioner, the Commission has been incompetent to make decisions, and there is no legal basis for a meeting of the Commission at this stage, and that the German Government "will ignore the decision to call the meeting of the Commission on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure."

The possibility that the German Government would take this position was taken into consideration in writing this

opinion, and this action on the part of the German Government strengthens the decision already reached, to wit, that the retirement of the German Commissioner on March 1, 1939, did not render the Commission *functus officio* and did not deprive the Commission of the power to decide the questions at issue at the time of his retirement.

184

Exhibit 20

Decision of the Commission Rendered by the Umpire,
dated June 15, 1939.

(Same as Exhibit II to Intervener's Answer, filed November 22, 1939.)

185

Exhibit 21

"Memorandum for the American Commissioner and the
Acting American Agent.

"I called at the German Embassy at about 2 p. m. today in order that I might leave with the German Agent and the German Joint Secretary copies of the notice sent out by me today informing them of the meeting of the Commission to be held on Monday, October 30, 1939.

"I was informed by Mr. Keil, the German Joint Secretary, that the German Agent, Dr. Paulig, had been transferred from the Embassy to the office of the German Consul General in New York City. I left the German Agent's copy of the notice with Mr. Keil and requested him to forward it to Dr. Paulig, which he said he would do.

"Mr. Keil also informed me that in view of the fact that there was no longer a German Commissioner, he could not attend this meeting.

(Signed) WALTER R. DORSEY,
American Joint Secretary.

"Oct. 23, 1939."

186

Exhibit 22

"Memo. for the American Commissioner and the
Acting American Agent.

"In compliance with the request of the American Commissioner, I called on Dr. Paulig yesterday in his office in the Whitehall Building, New York City, and delivered to

him, in person, a copy of my notice of Oct. 23rd, 1939, informing him of the meeting of the Commission to be held on Monday, October 30th, 1939. Dr. Paulig made no comments about the notice.

(Signed) **WALTER R. DORSEY,**
American Joint Secretary.

"Oct. 26, 1939."

187

Exhibit 23

Awards and Decisions Mixed Claims Commission, United States and Germany

Docket No. 8103.

List No. 11,333

UNITED STATES OF AMERICA, on Behalf of Lehigh Valley Railroad Company, *Claimant,*

V.

GERMANY

Award

This cause having come before the Commission for decision, the Agent for the United States and the Agent for Germany having been heard, due consideration having been had, and the Commission having rendered a decision herein dated June 15, 1939, in favor of the United States on behalf of several claimants, including Lehigh Valley Railroad Company, wherein the Commission determines that the decision of the Commission dated Hamburg, October 16, 1930, in docket Nos. 8103, 8117, et al. (Decisions and Opinions of the Commission, page 967), is set aside, revoked and annulled; and that the Government of Germany is liable to the United States on behalf of said claimants for the damages resulting to said claimants from the fires and explosions that occurred at the Black Tom Terminal of the Lehigh Valley Railroad Company at Jersey City, New Jersey, on July 29/30, 1916; the amount due claimant having been established, as stated below, and the date from which interest may be charged having also been determined; Now it is

ADJUDGED AND DECREED that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms, the Government of Germany is obligated to pay to the Government of the United States on behalf of Lehigh Valley Railroad Company the sum of Nine million Nine hundred thousand three hundred twenty-two and 77/100 (\$9,900,322.77) Dollars with interest at the rate of Five per cent. (5%) per annum from January 5, 1920, to date of payment.

Done at the City of Washington this 30th day of October 1939.

OWEN J. ROBERTS

Umpire.

CHRISTOPHER B. GARNETT

American Commissioner

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Exhibit 24

Awards and Decisions Mixed Claims Commission, United States and Germany

Docket No. 8117

List No. 4830

UNITED STATES OF AMERICA on Behalf of Agency of Canadian Car and Foundry Company, Limited, *Claimant*

v.

GERMANY

Award

This cause having come before the Commission for decision, the Agent for the United States and the Agent for Germany having been heard, due consideration having been had, and the Commission having rendered a decision herein dated June 15, 1939, in favor of the United States on behalf of several claimants, including Agency of Canadian Car and Foundry Company, Limited, wherein the Commission determines that the decision of the Commission dated Hamburg, October 16, 1930, in docket Nos. 8103, 8117, et al. (Decisions and Opinions of the Commission, page 967), is set aside, revoked and annulled; and that the Government of Germany is liable to the United States on behalf of said claimants for the damages resulting to said claimants from

the fires and explosions that occurred at the Kingsland Assembling Plant of Agency of Canadian Car and Foundry Company, Limited, at Kingsland, New Jersey, on January 11, 1917; and the amount due claimant having been established, as stated below, and the date from which interest may be charged having also been determined; Now it is

ADJUDGED AND DECREED that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms, the Government of Germany is obligated to pay to the Government of the United States on behalf of Agency of Canadian Car and Foundry Company, Limited the sum of Five Million Eight Hundred and Seventy-one thousand, One Hundred Five and 20/100 (\$5,871,105.20) Dollars, with interest at the rate of Five per cent. (5%) per annum from January 31, 1917, to date of payment.

Done at the City of Washington this 30th day of October, 1939.

OWEN J. ROBERTS

Umpire

CHRISTOPHER B. GARNETT

American Commissioner

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Exhibit 25

Mixed Claims Commission

United States and Germany

Docket No. 8117

UNITED STATES OF AMERICA in behalf of AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LTD., *Claimant*,

v.

GERMANY

Certificate of Disagreement and Supplemental Opinion of the American Commissioner on the Question of Jurisdiction Raised by the Motion of the German Agent, Dated November 24, 1936 and Filed December 7, 1936.

To Honorable Owen J. Roberts, Umpire:

On December 7, 1936, the German Agent filed a Motion dated November 24, 1936, in which he moved "to dismiss

for lack of jurisdiction the petition for rehearing filed" May 4, 1933, in so far as it related to the claim of the Agency of Canadian Car & Foundry Company, Ltd. At the time this Motion was filed, this claim had been pending before the Commission for over nine years. The Motion recites that "the German Agent has been advised that the stock the Agency" company "has at all pertinent dates been completely owned by the Canadian Car & Foundry Co., Ltd., Inc., a corporation organized under the laws of Canada" and that accordingly it "has no standing as a claimant before this Commission."

The American Agent on December 28, 1936, filed on behalf of the United States his Answer, and on January 22, 1937, his Brief in opposition to the Motion filed December 7, 1936.

190 On March 18, 1937, the German Agent filed a notice withdrawing his Motion filed December 7, 1936. On April 27, 1937 he filed a memorandum in which he "renews his request that the Commission dismiss the petitions for rehearing filed on May 4, 1933, as unfounded in fact and in law, and in so far as the claim of the Agency of Canadian Car & Foundry Company, Ltd., is concerned, also on the ground that it does not come within the jurisdiction of the Commission."

On January 12, 1939, the German Agent finally filed his Brief in reply to the Brief of the American Agent filed January 22, 1937.

When the German Commissioner, on March 1, 1939, announced his retirement, under the circumstances set out in the opinion rendered by the American Commissioner on June 15, 1939, and concurred in by the Umpire in his decision, the question raised by the Motion of the German Agent aforesaid was an issue supplementary to the main issues pending before the Commission, which issues included not only the question of the responsibility of Germany for the fires and explosions at Black Tom, New Jersey, but also for the fires and explosions at Kingsland, New Jersey. The action of the German Commissioner in retiring when he did is, in my opinion, tantamount to a disagreement between the two national Commissioners on all issues involved, including the jurisdictional issue raised with respect to the right of the United States to present as it did

the claim of the Agency of Canadian Car & Foundry Company, Ltd.

I, therefore, certify to the Umpire that there was a disagreement between the American Commissioner and the German Commissioner on the issue raised by the German Agent in his Motion filed December 7, 1936, asking that the petition of May 4, 1933, be dismissed in so far as it relates to the claim of the Agency of Canadian Car & Foundry Company, Ltd., on the ground of lack of jurisdiction.

I am submitting with this Certificate my opinion on the question of jurisdiction raised by the Motion of the German Agent aforesaid:

Supplemental Opinion of American Commissioner.

The Memorial in this case was filed on March 26, 1927. In said Memorial it was alleged in the preliminary statement as follows:

"1 This claimant is and at all of the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York (Ex. 392).

"2. In January of the year 1917 the claimant was the owner of a large assembling plant at Kingsland in the State of New Jersey, known as the 'Kingsland Assembling Plant,' consisting of several acres of land on which were located buildings, machinery, warehouses, railroad tracks, sidings, railway cars, telephone lines, electric light wires, water system and other equipment which was used for the purpose of assembling and packing munitions and supplies which were being manufactured by various companies throughout the United States under contracts owned by the claimant (Ex. 201).

"3. On January 11, 1917 there had been accumulated at this assembling plant, one of the largest collections of munitions and supplies destined ultimately for the Allied Governments that had ever been there at any one time (Ex. 10).

"4. On January 11, 1917 the entire Kingsland Assembling Plant including the buildings, machinery, warehouses, railway tracks, sidings, railway cars, telephone lines, electric light wires, water system and all of the said munitions and supplies, equipment and other property, was totally destroyed by a terrific series of fires and explosions, resulting in a large financial loss and damages to the

claimant (Ex. 10, 11, 12, 13, 169, 204, 206), the details of which loss and damage will hereinafter be more fully set forth."

In the answer of Germany, filed January 17, 1938, referring to the preliminary statement, the Answer states as follows:

"Claimant's allegations as set forth in paragraphs 1—4 of the Memorial are not contested."

There are certain facts upon which the claimant based its right to present its claim and its right to an award, to-wit:

1. Claimant has always had its offices in New York City.

2. Prior to the destruction of the Kingsland Plant claimant employed over one hundred and forty persons at its New York office alone.

3. Prior to the destruction of the Kingsland Plant, claimant had made subcontracts calling for preparation by subcontractors and purchase by claimant of materials in the amount of approximately \$65,000,000. Of this total, approximately \$60,000,000 was to be paid to American subcontractors and the balance to Canadian subcontractors.

4. At the time of the destruction of the Kingsland Plant, claimant was directly employing American labor to the extent of approximately 2,000 men, and its subcontractors were employing many other laborers.

On December 7, 1936, the German Agent filed a motion, dated November 24, 1936, asking the Commission to dismiss, for lack of jurisdiction, the petition for rehearing dated May 4, 1933, filed on behalf of the Agency of Canadian Car and Foundry Company, Ltd. Prior to the filing

193 of the German Agent's motion the claim had been pending before the Commission for over nine years.

In the "Application for the Support of Claims" executed by Agency of Canadian Car and Foundry Company, Ltd., by its president and secretary on November 23, 1920, and submitted to the Department of State with a letter dated December 1, 1920, from Coudert Brothers, of counsel for the claimant, the full facts respecting the stock ownership of Agency of Canadian Car and Foundry Company, Ltd., and also the stock ownership of Canadian Car and Foundry Company, Ltd., were set out as follows (An-

swer of American Agent filed December 28, 1936, to German Agent's Motion to Dismiss Petition for Rehearing, filed on behalf of Agency of Canadian Car and Foundry Company, Ltd., p. 5):

"7. (a) At the time the claimant acquired the claim the shares of stock were held by Canadian Car and Foundry Company, Ltd., the proportion of the shares of stock in that company held by citizens of the United States was approximately 30%, and the proportion of stock held by citizens or subjects of any other country at that time was 30% in Canada, and 40% in England."

"8. (a) At the present time the shares of stock of claimant are held by Canadian Car and Foundry Company, Ltd., and the proportion of shares of stock in that company held by citizens of the United States is approximately 45% and 55% by aliens."

These facts were brought to the attention of the then German Agent.

The United States has espoused the claim of the Agency of Canadian Car and Foundry Company, Ltd. Protests have been made to the State Department in behalf of certain award holders against the further consideration of this claim.

Reduced to its final analysis, the question to be decided on the Motion of the German Agent may be stated as follows:

194 Where a corporation is chartered under the laws of the State of New York but all of its stock is owned by a parent corporation existing under the laws of Canada, and the New York corporation maintains an office with a large office force of over one hundred forty people in the City of New York, and organizes and operates in the State of New Jersey a plant for the assembling of munitions destined for the Allies, and in this plant it assembles property worth over \$66,000,000 and employs 2,000 American workers, and such plant is destroyed by German agents, is the American corporation entitled to maintain its claim before the German-American Mixed Claims Commission under the Treaty of Berlin and the Agreement between the United States and Germany for the property thus destroyed, when 30% of the stock in the parent company was owned by citizens of the United States, 30% in Canada and 40% in England:

Under the Knox-Porter Resolution (42 Stat. 105), which was made a part of the Treaty of Berlin, it was provided, in section 2, as follows:

"Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its *nationals* any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extension or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its *nationals* have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise." (Emphasis supplied)

Under Section 5 of the resolution, it is provided that all the property of the German Government or its *nationals* which was on April 6, 1917, and thereafter in the possession and control of the United States should be retained by the United States until such time as Germany should have made suitable provision for the satisfaction of all claims against Germany

"* * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, * * * American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, * * *"

Under the Treaty of Berlin, the Knox-Porter Resolution was made a part of said Treaty in Article I, which reads as follows:

Article I

"Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in

the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States."

Part VIII, Annex I, of the Treaty of Versailles, which was also incorporated by reference in the Treaty of Berlin, provides that compensation may be claimed from Germany in respect of the following:

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war." (Emphasis supplied.)

196 By the agreement dated August 10, 1922 between the United States and Germany, the German-American Mixed Claims Commission was created and authorized to settle certain categories of claims enumerated therein. The categories are as follows:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war; and

(3) Debts owing to American citizens by the German Government or by German nationals.

It will be observed, therefore, that the Commission is given jurisdiction to hear and determine the claims of *American Nationals* or *American citizens*, in respect to the categories of claims defined by the treaties and by the agreement between the two governments.

Whether a claimant is an American National or not must be determined under the laws of the United States.

As to the meaning of the term "American National", Parker, Umpire, has defined it thus (Decisions and Opinions, p. 169):

"The term 'American national' has been defined by this Commission in its Administrative Decision No. 1 as 'a person wheresoever domiciled owing permanent allegiance to the United States of America'. 'National' and 'nationality' are broader and apter terms than their accepted synonyms 'citizen' and 'citizenship'. Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation. That status is fixed by the municipal law of that nation. *Hence the existence or non-existence of American nationality at a particular time must be determined by the law of the United States.* As pointed out by the German Commissioner in his opinion, the use in the Treaty of Berlin of the broad term 'nationals' and of the phrase 'all persons, wheresoever domiciled, who owe permanent allegiance to the United States' was
197 clearly intended to embrace, and does embrace, not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions. The use of the words 'permanent allegiance' as part of the phrase 'all persons, wheresoever domiciled, who owe permanent allegiance to the United States', far from limiting or restricting the meaning of the term 'nationals' as used elsewhere in the Treaty, makes it clear that that term is used in its broadest possible sense." (Emphasis supplied.)

On the same subject Dr. Kiesselbach, former German Commissioner, includes corporations within the term "citizens" and "nationals" (Decisions and Opinions, p. 160):

"One class—those 'who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.)'—and the other—those 'who are otherwise entitled to American protection in certain cases (such as certain classes of seamen on American ves-

sels, members of the military or naval forces of the United States, etc.)'. It is obvious that the circumscription of the first class squares with the term used in the Treaty of Berlin, 'claims . . . of all persons, wheresoever domiciled, who owe permanent allegiance to the United States,' and that class two comprises claimants who manifestly do not owe permanent allegiance to the United States—not being *nationals* of the United States."

It is clear, therefore, that the term "national" being broader than "citizen", and being used "in its broadest possible sense" include corporations.

This is in accord with the decision of the Supreme Court of the United States in *Society for the Propagation of the Gospel v. New Haven*, 9 Wheat. 464; *United States v. Northwestern Express Company*, 164 U. S. 696.

The next question to be decided is, whether the corporation claimant in this case is an American national, or, to put the question in another form, whether the fact that its stock was all owned by a Canadian corporation caused it to be an alien corporation and therefore made it impossible to present a claim to this Commission for the injury inflicted to its property in New Jersey.

The decision of the Supreme Court of the United States in the case of *Hamburg-American Co. v. U. S.* 277 U. S. 139, would seem decisive of this question.

In that case it was held that under the Trading with the Enemy Act of October 6, 1917, sec. 2, property in this country owned by a domestic corporation was non-enemy property, even though an enemy owned all of its stock.

In that case the Court of Claims sustained a demurrer to the petition of the Hamburg-American Line Terminal & Navigation Company seeking to recover compensation for its property, which was taken by the United States at the beginning of the war. Claimant was incorporated under the laws of New Jersey, but its entire capital stock had long been owned by the Hamburg-American Line, a German corporation. In reversing the Court of Claims, Mr. Justice McReynolds said, (p. 140):

"The court below evidently proceeded upon the view that the property of appellant corporations should be treated as owned by an enemy because their entire capital stock

belonged to a German corporation. And as the property was seized during the war with Germany it held there could be no recovery. Without doubt Congress might have accepted and acted upon that theory. * * * but Congress did not do so; it definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy. * * * *

"In *Bohn, Meyer & Co. v. Miller, Alien Property Custodian*, 268 U. S. 457, we held the status of the corporation was not fixed by the stockholders' nationality, and said—

"Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co. v. Continental Tyre & Rubber Co.*, 2 A. C. (1918) 307 * * * * *

199. In *Daimler Co. v. Continental Tyre & Rubber Co.*, 2 A. C. (1918) 307, cited by Mr. Justice McReynolds, the House of Lords reversed the holding of that case by the court below. (s. c. (1915) 1 K. B. 593).

In that case Lord Parker put forward for determining the character of a corporation the test of "control" and had imputed to a corporation the character of an enemy if the "control" was in the hands of alien enemies. On entering the war the United States deliberately refused to adopt the test of "control".

o. In *Hamburg-American Co. v. U. S.* 277 U. S. 139, cited and quoted above, Solicitor General Mitchell (afterwards Attorney General of the United States), in confessing error in the decision of the Court of Claims, used the following language (277 U. S. 138, 139):

"Congress has adopted the policy of determining the status of corporations as enemy or not without regard to nationality of their stockholders, and the United States admits error in the decision of the Court of Claims, in so far as it held that the property of New Jersey corporations was enemy-owned because all their stock was enemy-owned.

"As the appellant in each case is to be dealt with as a

citizen of the United States, notwithstanding its stock was enemy-owned, then upon the taking of the use of its property a contract to pay just compensation for that use was implied.

"The United States concedes that the judgment should be reversed and compensation awarded for the value of the use."

It is a settled general rule in America that regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or under whose laws it was organized, determines its national character. *Philippine Sugar Estates Development Co. v. United States*, 39 U. S. Court of Claims, 200 225; *Fritz Schultz, Jr., Co. v. Haines & Co.*, 99 Misc. 626; *Princeton Min. Co. v. First Nat. Bank*, 7 Mont. 530, 19 Pac. 210, 17 Fletcher Cyc. Corp., Permanent Edition, sec. 9298, p. 29, 14a C. J. 1213. See, also *Janson v. Driefontain Consol. Mines*, (1902), A. C. 484.

In 49 Law Quarterly Review (1933), 334-349, there is a very instructive article on the "The Nationality of Corporations", by H. R. L. Vaughan Williams, K. C., British Member of Anglo-German Mixed Arbitral Tribunal under Treaty of Versailles (1920-1928). In arguing against what is known as the "control" test, the author says (p. 342):

"Logically it seems impossible to reconcile such a view with the notion of the separate legal entity of a corporation, as distinct from its incorporators, while the practical difficulties in the way of applying the 'control' test of nationality are obvious. Shares in modern companies constantly pass from nationals of one country to nationals of another and with them participation in control. Is a company to change its nationality with fluctuations in the distribution of its shares among holders of different nationalities. Moreover, with the growing popularity of bearer shares, how is this distribution to be ascertained at any given moment? As a French writer has pointed out, the application of the 'control' test during the war was only possible because the outbreak of hostilities 'crystallized' the then existing state of things."

The author argues in favor of the theory that the nationality or effective domicile of a corporation is at its seige

social effectif, and this is defined as the place at which the corporation has made the center of its affairs; where are found concentrated its activities and its juridical life, and where its essential organs function. Measured by this test, the claimant in this case had its principal office from which its affairs were managed, in the United States, at New York City, and its activity and juridical life were concentrated either in New York City or in Kingsland,

201 New Jersey. In order to sue that corporation, a creditor would have to seek either the courts and laws of the State of New York or the courts and laws of the State of New Jersey, and not the courts and laws of Canada. In case of insolvency, the bankruptcy laws of the United States would apply and the rights of the various classes of creditors would be determined thereby. Its tangible and intangible property were taxable either in New York City or in Kingsland, New Jersey, and it was required to pay to the United States a federal income tax. Therefore, even if the doctrine contended for by the learned author be applied, the claimant in this case is not an alien corporation and is entitled here to present its claim.

In the Brief of the Agent of Germany, filed January 12, 1939, there are a great many allegations, many of them taken from secondary sources, from which it is claimed that this case has a Canadian aspect, and from which it is argued that the claimant is not an American national or American citizen within the meaning of the Treaty of Berlin, the Treaty of Versailles and the Agreement of August 10, 1922, between American and Germany. The whole basis of the German Agent's argument is that the claimant here was entirely owned and controlled by the Canadian parent concern and, therefore, that the claim is not impressed with American nationality.

The authorities relied on by the German Agent, so far as they sustain his argument, are based upon the proposition that the *control* of the corporation was in alien hands.

Even under the facts as alleged by the German Agent in his brief, it would seem clear, as held by the New York courts, that, while there may be said to be some
202 form of *remote* control in the parent company, the *direct effective* control of the claimant company was

in the New York corporation and not in the Canadian corporation (see *Dollar Co. v. Canadian C. & F. Co., Ltd.*, 100 Misc. N. Y. 564; aff'd 180 App. Div. N. Y. 895). Certainly the activities and property of the claimant company were fully impressed with American nationality.

If we were to adopt the rule contended for by the German Agent, we would be applying in this case a doctrine and principle exactly opposite to that adopted by Congress at the outbreak of the War and applied by the Supreme Court of the United States in the cases of *Hamburg-American Company v. U. S.* 277 U. S. 138, and *Bohn Meyer & Co. v. Miller*, 266 U. S. 457, and we would be reversing the general rule as laid down by the state and federal courts of the United States.

If we were to adopt the rule contended for by the German Agent, the effect would be that, under the two cases last cited, an American corporation, in which the stock is entirely held by a German corporation, would have a valid claim against the United States for property seized and taken during the war; but an American corporation, with property and large activities in the United States, whose stock is owned by a Canadian corporation, would have no valid claim against Germany for property destroyed in this country by German saboteurs before this country entered the War. Such a rule would result in the tacit recognition of the proposition that a foreign nation may, in anticipation of war, send its saboteurs to this country and destroy valuable property therein, and escape any claim for such destroyed property, if perchance such a corporation has stockholders who are alien to the country of the saboteurs.

I am, accordingly, of the opinion that the Motion of the German Agent filed December 7, 1936, should be
203 dismissed and that an award should be entered in favor of the claimant company pursuant to the Order of this Commission of June 13, 1939.

Respectfully submitted,

CHRISTOPHER B. GARNETT
American Commissioner.

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Exhibit 26

Mixed Claims Commission United States and Germany

Docket No. 8117

UNITED STATES OF AMERICA in behalf of Agency of Canadian
Car and Foundry Company, *Claimant*,

VS.

GERMANY.

Decision of the Umpire

The American Commissioner has submitted to me a certificate of disagreement respecting the standing of the claimant and the jurisdiction of the Commission to make an award to the claimant. This matter is involved in the submission which was before the Commission as part of the proceedings for the reopening of the decision dismissing the claim on the merits. The American Commissioner's certificate and opinion are supplementary to his certificate and opinion upon the American Agent's motions for rehearing and for awards in the Sabotage Cases.

I concur in the views expressed by the American Commissioner and hold that the claimant has standing before the Commission; that the Commission has jurisdiction of the claim; that the motion of the German Agent filed December 7, 1936, should be dismissed; and that the claimant is entitled to an award.

Done at Washington the 30th day of October, A. D. 1939.

OWEN J. ROBERTS

Umpire.

205

Exhibit 27

(Translation)

German Embassy

Washington, D. C.
October 3, 1939.

Mr. Secretary of State:

By direction of my Government I have the honor to make the following detailed statements to your Excellency, Supplementing my note of July 11, 1939:

In the note of July 11, the German Government, through me, had protested to Your Excellency against certain acts in the proceedings before the German-American Mixed Commission on the so-called Black Tom and Kingsland cases and had called the attention of Your Excellency to the fact that measures for remedying (these matters) are urgently required. By direction of my Government I had already protested most emphatically in this note against the decision of the American Umpire to grant awards in favor of the American and Canadian claimants, and also against all steps already taken and still to be taken by the American Agent for obtaining awards. At the same time I had requested Your Excellency to bring this protest and the declaration of my Government, that any "awards" of the rump Commission are void, to the knowledge of the Secretary of the Treasury of the United States. Lastly, I had announced in this note that I would take occasion in a further note to return to details of the above-mentioned

206 violations of the rules of procedure and all other serious irregularities which have occurred since March 1 in the procedure of the Commission.

As Your Excellency advised me by the note of July 20, a copy of my note of July 11 was sent to the Treasury Department of the United States.

The present note is intended to serve the purpose announced and will discuss in detail the violations of the rules of procedure in the proceedings continued before the rump Commission. The German Government regrets all the more to have to make protests against this procedure, because the German-American Mixed Commission could look back upon a model success in working, which had been made possible by confidential and friendly collaboration of the members of the Commission and the Two National Agents. It is characteristic of the spirit in which the so-called Black Tom and Kingsland cases in particular were treated by the German Government that the claims of the Lehigh Valley Railroad Company arising out of the explosion at the Black Tom Terminal, which Company was chiefly concerned, were admitted into the proceedings before the German-American Mixed Commission only because of voluntary admission by the German Government, after delay in submission. The German Government could have

decisively excluded any discussion of these claims by referring to their delayed submission and the incompetence of the Commission arising therefrom. However, it did not pursue this course, but opened to the American Government and the American parties concerned the possibility of submitting the claims to the Commission for investigation and decision, by agreeing to the admission of these claims into the proceedings of the Commission, despite the delay in application, which would not have been possible without its assent. The outcome was the decision of October 16, 1930, by which the Commission unanimously denied the claims arising out of the explosion at the Black Tom Terminal and also the claims arising out of the fire at the Kingsland factory.

According to the agreement between the German Government and the United States Government of August 10, 1922, this decision was to be accepted by both Governments as final and binding. Despite this provision, however, the American Agent submitted three applications in succession for reopening (of the cases), the first two of which were rejected by decisions of the Commission of March 30, 1931, and December 3, 1932. The third application for reopening, which was submitted on May 4, 1933, formed the subject of the last proceedings. In these proceedings there began the serious irregularities under discussion, which led to the withdrawal of the German Commissioner on March 1, 1939, and which finally reached their culmination in those measures against which the German Government found itself compelled to protest most emphatically.

1. The German Government sees the first violation of the basic agreements of the two Governments and the Regulations on Procedure of the Commission in the fact that early in June 1939 the American Commissioner on his own motion drew up and published an order by which a "session of the Commission" was called for June 15. As I have already stated in my note of June 10 addressed to Your Excellency immediately after this measure became known, there was no legal basis whatever for such a unilateral manner of action of the American Commissioner and for the holding of a "session of the Commission". Despite these protests, the American Umpire and the American Commissioner, to whose knowledge my note had been brought, held the "session" that was called

and at this meeting issued a "judgment" and also a decision on questions of the greatest importance. At the conclusion of this "session", the American Umpire announced that the "Commission" would hold a further "session" for the issuance of "awards", notices of which would be sent out.

As previously in my notes of June 10 and July 11, 1939, I again consider myself compelled now to call attention to the fact that during the vacancy in the position of the German Commissioner the Commission was incompetent to make a decision and therefore could not assemble for meetings either. The Commission is a *Mixed Commission*; consequently decisions as to the holding of sessions and all other decisions can be made only by collaboration of the two National Commissioners. This self-evident principle has, in addition, been confirmed explicitly in the Agreement of August 10, 1922, between the German Government and the United States Government, Article III of which reads as follows:

"They (the National Commissioners) may fix the time and place of their subsequent meetings according to convenience."

According to this the American Commissioner and the American Umpire have no power and no right to call meetings of the Commission without the collaboration of the German Commissioner or to hold sessions at which
 209 measures concerning Germany are discussed, ordered or promulgated. The Agreement of August 10, 1922 is the charter established for the Commission by the two governments, which is unalterable for the Commission. Under it, the Commission is composed of the two National Commissioners, and the Agreement of August 10, 1922 gives them the right to adjust the procedure and determine its course.

In order that no doubt may arise as to the view of the German Government, it is emphasized that in none of its communications has it taken the stand that by the withdrawal of the German Commissioner the Commission has become "*functus officio*" and has thereby lost its competence. The withdrawal of the German Commissioner has, in the opinion of the German Government, not produced such an effect; the matters covered by the Agreement of August

10, 1922, which were brought before the Commission in the proper way, within the framework of the agreements of the two Governments, belong, just as before, under its competence. The sole conclusive question here is whether during the vacancy in the position of the German Commissioner the American Commissioner, whether alone or jointly with the American Umpire, can exercise functions which the governmental agreement has entrusted to the two National Commissioners for joint exercise. Under the Agreement of August 10, 1922, no such authority of the American Commissioner exists.

By direction of my Government I therefore protest most emphatically against the holding of the further "session of the Commission" announced by the Umpire.

2. No less illegal than the calling and holding of the "session" of June 15, 1939, was the manner of action of the American Commissioner in the *first* matter which he treated at this meeting with the American Umpire. He made public a summary of the letters which he himself and the American Umpire had exchanged early in March 1939 with the German Commissioner, who has withdrawn. On the basis of an order issued by him the text of these letters, copies of which he made available, was reproduced in the report of the session. But not only was the text of the letters included in the records of the Commission and in the report of the session, but the American Commissioner embodied it also in subsequent written statements in which he attempted to prove the existence of a disagreement between himself and the German Commissioner.

The correspondence thus employed by the American Commissioner concluded with a letter of March 3 addressed by him to the German Commissioner, in which he made the assertion that the stage of disagreement had already been reached in the discussions of the Commission. This enumeration and employment of the correspondence by the American Commissioner was bound to create the impression and doubtless was intended to do so, that the letters were reproduced in full and that the German Commissioner had accepted, by maintaining silence, the above-mentioned assertion of the American Commissioner.

The picture of the written exchange of opinions between the two National Commissioners which the American Commissioner in this way caused to appear in the records and in his subsequent written statements was, however, incorrect. Immediately after the German Commissioner, (now)

211 withdrawn, had received the letter of March 3 from the American Commissioner, he most decidedly contradicted the assertion that he had dissented in the deliberations. In a letter to the American Commissioner written on that same day, a copy of which I sent to Your Excellency on July 10, he set forth clearly and in detail those facts and opinions which showed the incorrectness of the stand of the American Commissioner. Of special significance on this point are the following statements in the reply of the German Commissioner to the American Commissioner, of March 3:

"I surely reserved any decision of mine with respect to the question as to whether the cases should be reopened or not. This was a necessary consequence of the point of view held by all three of us, viz. that there could be no reopening, if the new decision on the old and new evidence taken together should be identical in tenor with the Hamburg Decision.

"... I reserved also my decision with respect to the question as to whether the Hamburg Decision had been reached upon false and fraudulent evidence. Certainly I put before you the doubts which might militate against such an assumption. But from reaching a decision about this point which might be considered as a definite agreement or disagreement I naturally refrained...

"I never should have formally disagreed on *anything* in this case without giving a fully substantiated written opinion.

"How far we were from any agreement or disagreement may be best evidenced by the fact that none of us had even touched upon the subject of the nationality of the Canadian Car Agency, also you yourself will hardly entertain any doubt that this question of jurisdiction or maybe of the substance of the case would be a part and topic of any decision."

It does not need to be emphasized that this letter was of decisive significance in judging of the question whether

a disagreement between the National Commissioners existed which would have justified the Umpire in taking up the questions brought before the Commission. The
 212 failure to place this letter of the German Commissioner in the records of proceedings and the written statements of the American Commissioner which the American Umpire accepted as his own, for his collaboration in the present cases, is an action which in itself alone stamps the proceedings conducted since March 1 as irregular. Failure to make known the position of the German Commissioner in opposition to the unilateral declaration of the American Commissioner regarding the alleged disagreement deprives the subsequent acts of the American Umpire of any legal basis and makes them void.

3. The following acts contrary to the rules of procedure were connected with the incomplete submission of the correspondence discussed in the foregoing paragraph:

After the American Commissioner had presented a document designated as a "Certificate of Disagreement" and a vote amounting to about 500 pages, signed by him, the American Umpire read aloud a statement designated as a "decision", in which he approved the American proposal of May 4, 1933, for reopening. At the same time the American Umpire made the vote of the American Commissioner, comprising 500 pages, a constituent part of his "decision" by citing it.

I am instructed to call attention most emphatically to the fact that the cases in question were not at a stage in which the American Umpire had authority to make a decision. His functions, as well as the conditions under which he is authorized and called upon to act, are exactly circumscribed and delimited in the Agreement of August 10,

1922, as well as in the Rules for Procedure of the
 213 Commission, established by joint agreement.

Article II of the Agreement provides:

"The two Governments shall by agreement select an Umpire to decide upon any cases concerning which the Commissioners may disagree or upon any points of difference that may arise in the course of their proceedings."

In the Rules of Procedure the following is prescribed:

"VIII. (a) The two national commissioners will certify in writing to the Umpire for decision (1) any case or cases

concerning which the Commissioners may disagree or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified."

It is thus made clear in a form excluding any doubt that the Umpire may move to a decision only if two prerequisites are fulfilled, viz.:

1. *A formal disagreement of the two National Commissioners on the controversial question submitted to them for opinion or decision must exist.*

2. *Both National Commissioners must have certified this disagreement in written form.*

Neither of these two conditions existed in the present case.

(Comment) on 1. A disagreement of the National Commissioners in the sense of the provisions of the Agreement of August 10, 1922 did not exist either with respect to substance or form. The status of the deliberations at the time of the withdrawal of the German Commissioner is evidenced by a letter which the American Commissioner addressed to Your Excellency on March 3, 1939, and in which he made the following statement:

214 "... We thereupon proceed to examine the whole record to determine from that record whether the American case had been proven. It was while the Commission was engaged in examining this question that Dr. Heucking's action in regard to his retirement was taken."

In connection with the statements which Dr. Heucking makes in his letter of March 3, withheld by the American Commissioner, the statement of the American Commissioner shows plainly that the deliberations of the Commission had not yet led to a disagreement. Hence there was absolutely no factual basis for the assertion made in the "decision" of the Empire: "Within the meaning and intent of this agreement... there exists a disagreement between the two National Commissioners."

(Comment) on 2. There was never submitted to the American Umpire a written certificate of disagreement prepared by the two National Commissioners. He had before him merely a document prepared and signed by the

American Commissioner by himself, to which there was annexed a so-called vote of the American Commissioner. Of course, such a document is not a certificate in the sense of the Rules of Procedure cited above.

4. The content of the "decision" of the American Umpire and the American Commissioner gives reason for the most serious representations. It provides in a striking way a confirmation of the events which led the German Commissioner to withdraw.

The German Commissioner made use of the right of withdrawal which is open to the Members of international commissions at any time, and moreover is also expressly provided in Article II of the Agreement of August 215 10, 1922, when during the course of the deliberations it became more and more evident to him that the American Umpire was most strongly biased in favor of the American private parties concerned and against Germany. Two phases of the deliberations in which this prejudiced view was shown with special clearness were characterized as follows by the German Commission in his letter to the American Umpire, of March 1, 1939:

"... In respect to the latest of our claims you introduced as your main point a point which was not made by the claimants at all and which, as far as I am aware, never was argued... I cannot shut my eyes to the fact that in my opinion it is not compatible with the position of an umpire and it shows a bias if the Umpire makes points and bases his decisions on them which are not advanced by the party favored by them. The Umpire actually assumes by such a procedure the attitude of a legal advisor for the favored party and does so under circumstances under which the other side can no longer expect equal justice.

"... It has become clear to me during those days that any argument advanced by the claimants at once attracts your attention and evokes the idea, How could it be collaborated? Any any argument advanced in favor of the defendants at once evokes in you the idea, How can it be refuted?"

The German Commissioner supplemented this remark with the depiction of the behavior of the American Umpire during the discussion of certain concrete portions of

the matter in the case and concluded his letter with the statement:

"The result to which I have come is that it is impossible for me to cooperate in a procedure which no longer offers to both parties equally the usual guarantee of a decision arrived at in a really judicial way."

This statement carries all the more weight as the American Umpire could find only the following answer to the letter of the German Commissioner of March 1, which, as shown, did not contain any accusations kept on 216 a general plane, but described in detail concrete occurrences in the deliberations:

"I do not propose to enter into any controversy with respect to the statements contained in your letter other than to say that they are unjustified and, in my opinion, present a wholly false picture of our deliberations."

The "decision" of the American Umpire and the American Commissioner of June 15 affords clear proof for the statements of the German Commissioner. Characteristic of this is in itself the fact that the American Umpire did not discuss the facts in the case exhaustively in his own remarks, as he had done in his earlier decisions but himself wrote a "decision" containing only a few paragraphs, but for the rest accepted the vote of the American Commissioner and made it the substance of his decision. Even a **hasty examination** of the "decision" thus made up discloses the character of a document in which the German Government is viewed and treated as an opponent in litigation. This attitude is characterized with special clearness by the appearance in a considerable number of places of expressions such as "we have proven" and "we have shown", which do not indicate the deliberations of a judge but are entirely natural for an advocate who sees it as his duty to prove his case against his opponent. In addition it must also be brought out that in astonishingly numerous places the evidence arguing in favor of Germany is represented as unessential or is made light of, while simple statements made by the American Agent against Germany are not only accepted without reserve, but their significance is even emphasized. Further, innumerable are the places at which statements of witnesses of the American 217 Government are sustained in the "decision" with-

out criticism as entirely conclusive and true, while German counter-proofs and German assertions against material of this sort are treated as nonexistent.

In this connection the treatment of the statement of an expert witness of the complainants, who designated the disputed "Herrmann report" as a genuine document, deserves special mention. On the German side reference had been made to *material contained in the record*, which plainly refuted the conclusions of this expert. This German declaration was not only left unmentioned by the rump Commission in its "decision", but it cited instead, in order to show the witness to be dependable and qualified, alleged pieces of evidence, which had not been mentioned in the case at all, and therefore did not belong to the material in the case, and hence must have been brought to the knowledge of the American Umpire and the American Commissioner subsequently and outside the proceedings.

A further evidently wrong conclusion of the Umpire refers to the thesis upon which the "decision" of the rump Commission is founded, viz. that the Black Tom case and the Kingsland case are *proven* if the so-called "Herrmann report" is genuine. On this point the American Umpire merely states in the "decision" that this consequence is *admitted*. The German Agent, by whom alone such an admission could be made, has never made such a statement. On the contrary, when the "Herrmann report" was discussed before the Commission for the first time, it was explicitly declared by the German Agent that the "report"

would not prove the allegation of the complainants
 218 even if it were genuine, which was not the case. In the written statement submitted by the German Agent in preparation for the last verbal discussion, it was also specially brought out that every assertion of the American Agent is opposed by Germany unless its correctness is explicitly admitted.

The German Government is further compelled to point out with all emphasis that the American Umpire has shown a complete reversal of his opinion in the judgment on the "Herrmann report", considered by him so important, in so far as its intrinsic value as evidence is concerned. When the American Umpire investigated the question of the genuineness of the "Herrmann report" in 1932 and de-

cided on it, he designated the contradictory statements of the witnesses and experts of the two parties as inconclusive. In contrast to this, he placed decisive weight on the intrinsic value of the document itself as evidence. The result of his exhaustive investigation and judgment of this intrinsic value as evidence, the naming of persons and places and the depiction of current and past events in the report, was summarized as follows by the American umpire in the decision of December 3, 1932:

"But enough has been said to show in how extraordinary a manner this document dovetails with all the important and disputed points of claimant's case and how pat all these references are, not to the request for funds but to the claimants' points of proof—this aside from the absurdity of sending this unnecessary information into an enemy country to a suspected spy then under surveillance."

After the Umpire had considered two further suspicious but less important factors, he closed his judgment on the "Herrmann report" with the statement:

219 "... The silent but *persuasive intrinsic evidence* makes it impossible to reach a conclusion in favor of the claimants and against Germany."

These statements of the Umpire, independent of any biased allegations and of external evidence, were bound also to remain unalterable for the whole future, just as the content of the document upon which they were based remained unalterable.

The difficulty arising out of this with respect to the overthrowing of his own decision was pushed aside by the American Umpire with the simple statement that further study had converted him to the opinion that the intrinsic evidence confirmed the genuineness of the "Herrmann report." That he had called "absurd" in December 1932 was now illuminating; what he had then designated as impossible, incredible and improbably now became convincing, credible and explicable. Without going into detail as to the points on which his earlier decision on the intrinsic evidence of the "Herrmann report", the reasons for which were given in such conclusive form, had now proved to be faulty, he states in a few words that the renewed argument and a further exhaustive study of the content of the report (which, according to the explicit statement in his

1932 decision, he had already investigated and evaluated most thoroughly at that time) as well as further study of the statements of two witnesses and of the records as they existed at the time of the Hague pleadings, (again material which the Umpire had investigated most thoroughly prior to the decision of December 3, 1932) had led to this reversal of his opinion.

These facts speak more strongly than any criticism can do.

220 5. How little disposed the American Umpire was to concern himself with the German evidence and how he placed himself above recognized principles of international law and also above the firmly grounded practice of the Commission with respect to decisions, is shown by the treatment of the case of the Agency of Canadian Car and Foundry Company, which was chiefly concerned in the Kingsland case.

It was absolutely clear to the Commission that all of the shares of stock of this concern, which had been inactive for many years, belonged to a Canadian corporation domiciled in Montreal, and that consequently the claims of this complainant were made exclusively for the benefit of Canadian interests. According to practice supported by several decisions of the Commission, the claims of the Agency of Canadian Car and Foundry Company did not come within its jurisdiction at all. Although the Commission is to view this view in and of itself (*sua sponte*), the German Agent had also submitted a formal proposal in which he asked that the application for reopening of the case submitted for the benefit of the Canadian interests be rejected *a limine* in view of their lack of American nationality. A few days before the beginning of the oral final arguments, the German Agent submitted also a printed statement giving the reasons in detail for this stand. Lastly, the German Commissioner, in his letter of March 3, 1939, withheld by the American Commissioner, pointed out the fact that the question of nationality of the complainant Canadian company belonged among those points which the Commission would have to investigate before the promulgation of a decision. It has become known

221 to the German Government that American companies which are holders of older awards have requested

the United States Government to refuse its protection to the Canadian claims and that they were informed that the question of handling the claims of the Agency of Canadian Car and Foundry Company would have to be decided by the Commission.

The American Umpire and the American Commissioner, however, did not express themselves at all on this question, which is decisive with regard to claims to several million dollars, and they did not even find it necessary to mention the existence of the opposition raised by the German Government.

The German Government finds itself compelled to enter a most emphatic protest against this also. The approval of claims of Canadian interested parties in a procedure which the German Government and the United States Government have established for the settlement of claims of American citizens is null and void.

6. In the last arguments before the Commission, the procedure was limited strictly to the preliminary question of the alleged misleading of the Commission, as had been maintained by the American Agent. Hence the German Agent refrained at this stage of the proceedings from taking any stand on that point and refrained from the submission of counter evidence on all points which in his opinion were irrelevant to the preliminary question of "misleading", and without regard to the question of whether they would be of essential importance in case of a possible reopening of the proceedings on the main question, that is on the responsibility of Germany. He
 222 was able to follow this course with all the less hesitation, as it corresponded to the principles which the Umpire had established in a decision of November 9, 1935. The German Agent also explicitly invoked these considerations, determining his behavior, in explaining his action in the case.

If the Commission, in opposition to the opinion of the German Agent, considered as essential a point which he held to be unessential and did not discuss in his written statements or his arguments, it should have called his attention to that fact and should have called on him for a statement with respect thereto. This duty arising out of general rules of procedure was explicitly laid down in the

Regulations on Procedure, which the Commission established for the proceedings in the Black Tom and Kingsland cases in its order of March 29, 1929, and which, in view of the tens of thousands of pages of material in the cases, were intended to prevent the possibility of conclusions being drawn, to the disadvantage of one party, from failure to discuss single phases of this enormous amount of evidence. The essential provisions of the Order of the Commission of March 29, 1929 (Rule III) reads as follows:

"If any member of the Commission considers a point not orally argued one which should be taken into account in the Commission's decision, counsel's attention will be called thereto during the progress of the argument or subsequent thereto, and counsel for both parties will be given an opportunity to discuss same on the oral argument or to file written or printed briefs within a time to be fixed by the Commission covering such particular point or points."

Not only have the American Umpire and the American Commissioner disregarded this binding rule of procedure, but they have also made the statement at various places in their "decision" that the German Agent had not expressed himself regarding assertions of the American Agent. Important conclusions are drawn in the "decision", to the disadvantage of Germany, from this alleged silence.

7. The violations of procedure stated in the foregoing reached their culmination in the occurrences following the reading aloud of the "decision", to illustrate which I should like to make the following preliminary remarks on the state of the proceedings at that time:

As I have already brought out once, the proceedings were strictly limited to the preliminary question of whether the Commission should revoke the unanimous decision of October 16, 1930, rejecting the complaints in full, and should grant reopening of the proceedings. The material question of the justification of the claims, which is entirely separate from the preliminary question of a possible reopening, had been postponed and could be decided, if at all, only after carrying out of the procedure after reopening. This plain method of procedure, established by the Commission itself, thus presupposed a decision on the proposal for reopening.

the proceedings. Not until after a possible pronouncement of a favorable decision could and should the main question be entered upon in the proceedings, and not until after the conclusion of these proceedings could the question of the responsibility of Germany have been submitted to the two National Commissioners for decision and, in case of a possible disagreement of the Commissioners, to the Umpire for the granting of an award. Any proceedings that might have become necessary respecting the amount of the damage allegedly caused, the method of proving this
 224 and the proof of any financial claims of the complainants arising therefrom would have been reserved for a still further stage in the proceedings. In the correspondence exchanged in the years 1927 and 1928 the fully empowered representatives of both Governments had agreed that this last set of questions should be taken up only in case the Commission should decide that Germany was responsible in one of the two cases or both of them, and not until then. As a matter of course, Germany and the United States would have the right to submit evidence and written statements in the proceedings, if any, regarding the alleged responsibility of Germany and in any further proceedings as to the amount of the claims, and also to demand oral arguments thereon if necessary. In the expectation that the American Agent and also the Commission would observe this agreement faithfully, the German Agent had not taken any stand with respect to the American evidence on the amount of damage and had not introduced opposing evidence of any kind.

The Commission itself has made plain this legal situation in unmistakable form in two decisions which it issued in order to establish directions for the two National Agents regarding the scope and the form of the action taken by them in the written as well as the oral proceedings. When in 1935 the American Agent adopted the surprising view that the next decision of the Commission ought to cover both the preliminary question of reopening and also the question of the responsibility of Germany, the Umpire stated in a decision of July 29, 1935:

“ . . . The first step is the determination whether the claimants' assertions as to fraud, et cetera, are made
 225 out . . . The relevancy and weight of evidence upon

the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits if a rehearing be granted will be quite a different thing . . . Germany insists that the preliminary question be determined separately. *I am of the opinion that is her right. The next hearing, therefore, will be upon the question of reopening vel non and not upon the merits.*"

A second time the Commission confirmed this legal status in the unanimous decision of June 3, 1936, in which it declared:

" . . . Before the Hague Decision may be set aside the Commission must act upon the claimants' petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits. *Both parties are entitled to file evidence (and to exchange briefs) as are in the proceedings in which a ruling for reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted.*"

It could not in fact be made clearer that on the basis of the oral arguments then in prospect, which took place in January 1939, a decision could and would not be issued on any other question than the justification or non-justification of the American Agent's motion for reopening.

In spite of this unambiguous legal situation, the American Agent made the plea at the "session" of the rump Commission that awards be granted in favor of the private interests concerned. As this demand involved the question of the responsibility of Germany and the question of the amount of the damages allegedly arising, the Commission (assuming that it was capable at all of making a decision) would certainly have had to reject the application of the American Agent, in accordance with its decisions cited above, binding upon itself and the

226 Agents of the two Governments. However, the American Umpire took the absolutely unjustifiable step of approving the petition forthwith, by declaring:

"In view of what appears in the record, and based upon the American Agent's motion, the Commission is prepared

to sign awards, to be submitted by the American Agent, if approved by the Commission as to form. Those may be submitted, and if approved will be made at a further meeting to be called on notice."

As I have already stated in my note of July 11, 1939, this method of procedure is an event without parallel in the history of international commissions and courts.

Without hesitating even for a moment (not a single minute had elapsed since the making of the motion) the American Umpire decided, leaving out of consideration entirely the guarantees given to Germany by himself and the Commission, *on extremely important questions, which had never been the subject of proceedings and had never been submitted to the Commission for decision by the two National Agents.* In this connection it must be taken into consideration that the Umpire himself in a decision of December 15, 1933 on the cases in question, had declared that in view of the completion of the arguments of the National Agents the Commission by no means had the freedom of action of ordinary courts and could not decide a disputed case unless both Agents had given their agreement thereto by written statements. He said at that time:

"The Commission has from its inception been sensible of its lack of power to compel the closing of the record and the final submission of any case . . . It has never, as I am advised, entered an order for the final closing of the record in any case without consent or over objection. *I do not think it has power to do so.*"

Plain language is also used in the order of the American Umpire that the American Agent should submit the awards "for signing by the Commission". The Agreement of August 10, 1922, does not present the slightest ground for the authority to transfer unilaterally to the Agent of one party such important functions, which are exclusively the business of the two National Commissioners. As the German Agent, trusting in the Agreement made with the American Agent in the years 1927 and 1928, had failed entirely to take any stand with regard to the amount of the alleged damages or to submit counter-proof, the action of the American Umpire means that the measurement of the amount of damage and of the claims is based entirely upon the allegations in the case

and the evidence which the lawyers of the American and Canadian private parties have assembled, who are most keenly concerned in the fixing of the highest possible amounts of damage.

This method of action of the American Umpire contrary to the rules and in contradiction to any idea of a judicial decision, reaches its culmination in his announcement that the "Commission" will sign the awards, if they have been approved by the "Commission" *as to form*. ("The Commission is prepared to sign awards to be submitted by the American Agent, if approved by the Commission *as to form*.") The statement made by the American Umpire shows clearly that investigation of the sums of damages established unilaterally by the complaining party and without possibility of opposition, would refer only to certain requirements as to outer form, but not to the material establishment of the amount of damages—
 228 and this in a litigation between two sovereign Governments, in which the uninvestigated claims amount to approximately \$40,000,000!

The statement of reasons for the decision of the American Umpire, that he was acting "in view of what appears in the record" and was taking as a basis "the motion of the American Agent" ("In view of what appears in the record and based upon the American Agent's motion"), is adapted only to emphasize the arbitrary character of his action. Not one single fact is contained in the record which could form a basis for his decision above. As far as the motion of the American Agent that is referred to is concerned, the latter was restricted to the following unsubstantiated assertion:

"... In view of the attitude of Germany, as expressed in the communications between the German Commissioner and the Umpire and the American Commissioner, and the communication between the German Embassy and the Secretary of State of the United States, it is apparent that Germany does not intend to take any further part in the proceedings before this Commission, and seeks to avoid a final conclusion, and frustrate the work of the Commission."

It is evident from this that the American Umpire based decisions of the very greatest importance not upon facts according to the record but contented himself with one-

sided partisan assertions which represented an arbitrary evaluation and interpretation by the American Agent of my note of June 10, 1939, addressed to Your Excellency and the two letters of the German Commissioner of March 1st. It does not need to be explained that such evaluations and interpretations cannot serve as the basis for an important motion in a case or in fact for a decision, entirely aside from the fact that the communications of the withdrawing German Commissioner were not submitted in full at the "session" of the rump Commission, the specially significant letter of March 3, 1939, being omitted, and were entered in the record of the session in that form. The interpretation which the American Agent gave to the statements in my note to Your Excellency of June 10, 1939, and to the written remarks of the German Commissioner was in every respect baseless and arbitrary; the documents do not contain a single word that might justify his assertions.

The American Umpire has and had no authority at all to concern himself with the motion to grant awards. As I have had occasion to remark repeatedly, the statute of the Commission established the principle that the discussion and investigation of all matters brought before it is in the first place exclusively the business of the two National Commissioners. They compose the Commission. The Umpire can act only under certain fully defined conditions, and his duty is strictly limited "to deciding on all cases in which the Commissioners might be of differing opinions".

The motion of the American Agent asking for the issuance of awards was not discussed by both Commissioners at any stage of the procedure before the Commission nor was it the subject of an exchange of opinions between the Commissioners. Therefore there is not the remotest possibility of speaking of the occurrence of a disagreement of the National Commissioners, which is an indispensable prerequisite for the Umpire to concern himself with the matter and make a decision. The decision made by the American Umpire on this question is a function which he usurped in violation of the statute of the Commission.

230 To sum up, it appears therefore that the "decision" of the American Umpire, which contemplates

the issuance of awards, was issued in disregard and violation of essential provisions of the statute of the Commission, essential agreements between the German Government and the United States Government, essential rules of procedure and binding decisions of the full Commission; the observance of which would have been the absolute duty of the American Umpire. (The Agreement between the two governments of August 10, 1922; the Rules of Procedure established jointly; the Decisions of the Commission of July 29, 1935 and July 3, 1936, as well as the agreement of the Agents of the two Governments of the years 1927 and 1928 on the treatment of the question of the amount of alleged damages.)

Accordingly the acts and orders of the American Umpire and the American Commissioner since March 1, 1939, among them the reopening of the proceedings in the Black Tom and Kingsland cases, the "decision" of the Umpire and the American Commissioner on the responsibility of Germany in both cases, and the arbitrary granting of awards by the American Umpire, are null and void. Any awards which the American Umpire and the American Commissioner might issue on the basis of these measures are likewise null and void. They can never form the basis for a financial obligation of Germany. A document which has been drawn up without any collaboration of the German Commission can, besides, never be considered or accepted as an award of the "Mixed Commission."

By direction of my Government I therefore raise
 231 once more the most emphatic representations against all violations of the rules of procedure and illegal acts of the American Umpire disclosed in this note. I am directed to protest against all further measures planned by the American Umpire, the American Commissioner and the American Agent, which are aimed at securing awards in the Black Tom and Kingsland cases. I request Your Excellency to advise the Treasury Department of the United States, upon which the payment of awards is incumbent, of the contents of this note, and I should be grateful if one copy of this note were also sent to the American Umpire and one to the American Commissioner.

By direction of my Government, I should like to express the hope that the United States Government does not ap-

prove of the violations of procedure discussed in this note and that it will find some way of quashing them, in order to restore, in collaboration with the German Government, the basis existing before the beginning of these violations of procedure, upon which the proceedings can be brought to a conclusion in an orderly way.

Accept, Mr. Secretary of State, the renewed assurance of my most distinguished consideration.

THOMSEN.

His Excellency

MR. CORDELL HULL,

Secretary of State of the United States,
Washington, D. C.

232

Exhibit 28

Department of State
Washington,

October 18, 1939

My dear Mr. Garnett:

In conformity with a request of Herr Hans Thomsen, German Charge d'Affaires ad interim, I enclose a copy of the translation of his note of October 3, 1939 in relation to proceedings before the Mixed Claims Commission, United States and Germany, regarding the so-called sabotage claims. I also enclose a copy of the Department's reply to the above-mentioned communication.

Sincerely yours,

CORDELL HULL.

Enclosures:

1. Translation.
2. Department's reply.

The Honorable

CHRISTOPHER B. GARNETT,

Commissioner, Mixed Claims Commission,
United States and Germany,
Washington, D. C.

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Exhibit 29

October 18, 1939.

Sir:

I acknowledge the receipt of your note of October 3, 1939 with reference to proceedings of the Mixed Claims Commission, United States and Germany, in relation to the so-called Black Tom and Kingsland cases pending before that tribunal.

In conformity with your request, copies of a translation of your note under acknowledgment are being forwarded to the Secretary of the Treasury, the Umpire, and the Commissioner appointed by the United States.

I must refrain from engaging a discussion of the various complaints and protests set out in your communication and content myself by stating that since the Department is without jurisdiction over the Commission I consider that it would be highly inappropriate for it to intervene directly or indirectly in the work of the Commission or to endeavor, in the slightest manner, to determine the course of its proceedings.

I have entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite your severe and, I believe, entirely unwarranted criticisms, and I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion.

Accept, sir, the renewed assurances of my high consideration.

CORDELL HULL

HERR HANS THOMSEN,

German Charge d'Affaires ad interim.

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Affidavit of John J. McCloy

Filed November 30, 1939

John J. McCloy, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Cravath, de Gersdorff, Swaine & Wood, of New York, N.

Y., counsel for Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, Bethlehem Steel Company, and Committee on Black Tom Island Disaster, which, except as stated below, companies and Committee are or represent all the holders of awards of the Mixed Claims Commission granted pursuant to the decisions of said Commissioner, dated June 15, 1939, and October 30, 1939, as set forth in Exhibit III annexed to the answer herein of intervenor Lehigh Valley Railroad Company. I am not counsel for, nor does any of the above named corporations or Committee represent, the claims of Mary Leyden Curry, Cornelius J. Leyden, Jr., John
236 Leyden and Francis B. Leyden, Docket No. 8467, upon which claims awards were granted by the Commission as set forth in said Exhibit III.

Under the Settlement of War Claims Act of 1928 (45 Stat. 254), as amended, and under the regulations of the Treasury Department adopted pursuant to the provisions of said Act, as amended, payment by the Secretary of the Treasury of the amounts due in respect of awards by the Mixed Claims Commission must be made upon the filing with the Secretary of the Treasury, before March 11, 1940, of an application for such payment in accordance with the form provided for such purpose by the Treasury Department, a copy of which is annexed hereto as Exhibit 1.

Immediately upon the entry of awards in favor of the so-called sabotage claimants on October 30, 1939, applications for the payment of such awards by the Secretary of the Treasury, in the form annexed hereto as Exhibit 1, were prepared under my supervision for all awardholders listed in Exhibit I annexed to the answer of intervenor Lehigh Valley Railroad Company (except for the Curry-Leyden claims referred to above). All such applications have been duly filed with the Secretary of the Treasury, except in the following cases:

Commercial National Fire Insurance
Company by Central Trust Company
of Illinois, Receiver
Firemen's Fund Insurance Company
Lumber Underwriters
New York & Boston Lloyds

Docket No. 8240
Docket No. 8252
Docket No. 8265
Docket No. 8272

Ohio Valley Fire & Marine Insurance

Company by J. W. Jeffers, Receiver	Docket No. 8361
Underwriters at American Lloyds	Docket No. 8288
Underwriters at Great Western Lloyds	Docket No. 8289
Union Underwriters of New York	Docket No. 8290

237 Applications for the payment of awards in the foregoing cases are now being completed, and will be filed at the earliest possible date.

On November 14, 1939, I was advised by the General Counsel to the Secretary of the Treasury that although no question was raised by the Treasury Department concerning the validity of the awards, the Secretary of the Treasury had been served with a copy of the complaint in this action and would decline to make immediate payment on account of such awards. Said General Counsel furnished me with a copy of a letter, dated November 14, 1939, addressed to Lehigh Valley Railroad Company, a copy of which is annexed hereto as Exhibit 2, and informed me that the original of such letter was being sent to Lehigh Valley Railroad Company and that similar letters were being forwarded to all other holders of awards in respect of the sabotage claims who had made application for payment thereof.

JOHN J. McCLOY

Sworn to before me this 28th day of November, 1939.

JOHN H. STUCCHIO

(Notarial Seal)

Notary Public, Kings County

Kings Co. Clerk's No. 933, Reg. No. 1210

N. Y. Co. Clerk's No. 383, Reg. No. 18818

Commission expires March 30, 1941

238 Exhibit I is Treasury form designated Department Circular No. 397 Accounts and Deposits, on which application to Secretary of Treasury for payment of awards of Mixed Claims Commission, United States and Germany, are made.

Exhibit 2

[Letterhead of]

Treasury Department
Washington

Nov 14 1939

Attention: R. W. Barrett,
Vice President and General Counsel.

Dear Sir:

Re: Award to Lehigh Valley Railroad Company,
Docket No. 8103; List No. 11,333

Reference is made to your recent application for payment of the above award of the Mixed Claims Commission, United States and Germany.

On October 31, 1939, the Secretary of the Treasury was served with a copy of the complaint in an action entitled: *Z. & F. Assets Realization Corporation v. Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of the Treasury*, brought in the District Court of the United States for the District of Columbia, relative to the awards of the Mixed Claims Commission, United States and Germany, on the so-called sabotage claims.

No payments on account of such awards are being made at this time.

Very truly yours,

(s) D. W. BELMONT

Assistant to the Secretary.

Lehigh Valley Railroad Company,
Law Department,
143 Liberty Street,
New York City, New York.

Hubert E. Rogers, being duly sworn, deposes and says:
I am one of the attorneys for the plaintiff.

Preliminary Statement

This affidavit is interposed in opposition to the motion of the Lehigh Valley Railroad Company, intervenor de-

fendant, for summary judgment, subject to two preliminary objections: (1) that the motion to dismiss the complaint cannot be properly interposed by the said
241 intervenor in view of the rule that intervention must be always subordinate to the plaintiff's claim; and (2) that the motion for summary judgment directing payment to the defendant-intervenor is prematurely made in view of the fact that no reply has been served to the cross-claim upon which the said motion is based, in fact, I have been informed that it has been stipulated between the defendant and the defendant-intervenor that the defendant-intervenor would not press its motion for summary judgment against the defendants, therefore the motion for summary judgment must be dismissed.

Nature of Action, Including Statement of Grounds in Complaint.

This action is brought to declare void the awards granted on October 30, 1939 to the defendant-intervenor and other holders of awards by the Mixed Claims Commission, United States and Germany, pursuant to the decisions of said Commission dated June 15, 1939 and October 30, 1939; the holders of these awards will be hereinafter called "Sabotage Claimants".

The plaintiff, Z. & F. Assets Realization Corporation is a holder of five awards granted prior to said last mentioned dates, and brings this action in behalf of itself and all other American holders of awards granted prior to said last mentioned date, and throughout this affidavit the said plaintiff and said holders of awards granted prior to said last mentioned dates will be called the "Old Award Holders".

242 The claim of the invalidity of said awards is based upon the grounds set forth in paragraph "31" of the complaint.

To sum up some of said grounds mentioned in paragraph "31", it is the claim of the plaintiff;

(a) that, the claims of the sabotage claimants having been previously dismissed, there was no jurisdiction on the part of the Mixed Claims Commission to grant a rehearing;

(b) that, by reason of the resignation of the German Commissioner, on the 1st day of March, 1939, during the

deliberations of the said Mixed Claims Commission, the Commission was without power or jurisdiction to take further action until a new German Commissioner was appointed;

(c) that, at the time of said resignation of the said German Commissioner, the only question under consideration was whether fraud had been committed sufficient to justify the reopening of the previous decisions dismissing the sabotage claims;

(d) that the two National Commissioners had not arrived at a disagreement even on that single question, and that, there was no certificate in writing in accordance with the Rules of the Commission authorizing the Umpire to decide;

(e) that, assuming that the Commission had power to reopen and was justified in so reopening its previous decision there had been no actual rehearing upon the sabotage claims;

(f) that the direction for the entry of an award without said actual rehearing was without notice to the German Government;

(g) that there had been no disagreement certified in writing to the Commission as to the amount of damages; and this question was never even considered by the Commission;

(h) that there was no basis for the statement that the German Government was not willing to participate in the proceedings before the Commission;

(i) that the Court had no jurisdiction to entertain the claim of the Agency of the Canadian Car & Foundry Company, Ltd., because of the fact that the shares of stock of the Agency of the Canadian Car & Foundry Company, Ltd. were owned by a Canadian parent company, and therefore the entry of an award to said Agency of the Canadian Car & Foundry Company, Ltd. is null and void and without jurisdiction on the part of the Commission;

(j) and on the further ground that the Court had no jurisdiction to enter awards in favor of corporations whose stock is or was owned by foreign nationals.

243 *History of Commission*

In the moving affidavit of Harold H. Martin, the history of the establishment of the Commission under the Joint Resolution of Congress of July 2, 1921, known as the

Knox-Porter Resolution (42 Stat. 105, 106), and the Treaty of Berlin incorporating said Resolution, which Treaty was signed in Berlin on August 2, 1921 (42 Stat. 1929), and the Executive Agreement annexed to the complaint (42 Stat. 2200), providing for the Mixed Claims Commission, United States and Germany, are set forth.

The moving papers also set forth the establishment of said Commission pursuant to said agreement annexed to the complaint and the appointment of the various Commissioners and the various Umpires, including the appointment of Mr. Justice Roberts as Umpire on March 24, 1932, and the appointment of Mr. Christopher B. Garnett, the American Commissioner on September 12, 1936, and the appointment of Dr. Victor Huecking, German Commissioner, on May 31, 1934, thus establishing the fact that the Commission which originally dismissed the sabotage claims on October 16, 1930 and again on March 30, 1931 was composed of entirely different members than the one which dismissed the claim on December 3, 1932. The Commission which dismissed the claim originally and the second time was composed of the same members. Subsequent to the dismissal on December 3, 1932, a new German Commissioner was appointed and subsequent to the decision of June 3, 1936, hereinafter referred to a new American Commissioner was appointed. Hence, the Commission in January, 1939, was composed of the Umpire, who had participated as such from 1932, a German Commissioner who had participated since 1934 an American Commissioner who had participated since September, 1936.

Sabotage Claims

The claim of the defendant-intervener was filed a considerable time after the time for the filing of claims had expired, but the German Government consented to the filing thereof.

244 I am informed that efforts were made in 1924 to settle these sabotage claims, but the German Government at no time was willing to concede its liability, and any tentative offer of settlement was predicated upon the condition that such settlement was not to be deemed in any way an admission on the part of the German Government of responsibility for the acts complained of, but the American Agent was not willing to accept the said stipulation re-

requested by the German Government, and for that reason, among others, the settlement was not consummated.

While the statement on page 8 of Mr. Martin's affidavit on the motion herein is immaterial, I would like to call attention to the fact that his statement, "The German Agent opposed the proposed amendment", is incorrect. At page 195 of the hearings before the Senate Finance Committee, 70th Congress, H. R. 7201, January 23-26, 1928, the following appears:

"Senator Reed. And if I correctly understand your testimony today, Judge" (referring to Judge Parker) "it is that the German agent and the German Government have shown no disposition to delay or to prevent consideration of any case which would justify any such pressure being imposed upon them.

"Mr. Parker. I know they have not. However, when that suggestion of Mr. Boles was repeated to me I asked Dr. Kiesselbach, the German Commissioner, if there was any objection on his part or on the part of Germany to such an amendment, and he said there was not: that Germany was prepared to expedite the disposition of these claims in every possible way, and that so far as they are concerned they would not object to such an amendment." (*Italics ours*)

The sabotage claims finally came on for hearing on April 3, 1929, but upon the explicit understanding, as mentioned in the moving affidavit (p. 10) that the question of the measure and amount of damages should be postponed until after the determination of the question of Germany's liability.

Beginning on April 3, 1929, the cases were heard in oral argument extending over nine days.

245 On October 30, 1929, Umpire Parker died and on January 9, 1930 Mr. Boyden was appointed to succeed him. From September 18 to 30, 1930, the cases were reargued at the Hague, the argument covering a period of twelve days.

*First Dismissal of Claims by
Decision of October 16, 1930.*

On October 16, 1930, the Commission dismissed the sabotage claims. A full copy of the opinion is annexed hereto as Exhibit A.

The decision (Exhibit A) was made public, according to Mr. Bonyng's 1934 Report (page 192) on November 14, 1930, simultaneously by the United States Department of State and by the German Foreign Office. Formal announcement of the decision in the records was not made until the meeting of January 9, 1931.

*Second Dismissal of Claims By
Decision of March 30, 1931.*

A petition for rehearing of the Black Tom claims was filed on January 12, 1931, and a similar petition in respect to the Kingsland claims was filed on January 22, 1931. No new evidence was filed with these last applications for rehearing and these applications for rehearing were dismissed on March 30, 1931. I quote the following from the opinion of the full Commission (Dec. & Op. p. 995):

"Although the rules of this Commission, *conforming to the practice of international commissions*, make no provision for a rehearing in any case in which a final decree has been entered, these petitions have been carefully considered by the Commission." (Italics ours)

*Third Dismissal of Claims by
Decision of December 3, 1932.*

On July 1, 1931, a joint supplemental petition for rehearing of these claims was filed. Mr. Boyden, the Umpire, died shortly thereafter and Judge Roberts was appointed in his place. This petition was dismissed on December 3, 1932, with an opinion part of which reads as follows—
246 (Dec. & Op. p. 1025):

"As it is my opinion that if the new evidence were formally placed on file and considered in connection with the whole body of evidence submitted prior to the Commission's opinion of October 16, 1930, the findings then made and the conclusions then reached would not be reversed or materially modified, the question as to our jurisdiction need not be answered."

In the moving affidavit, at p. 12, Mr. Martin quotes from the argument had upon the second petition for rehearing, referring to an inquiry made by the American Agent as to the attitude of the German Government on the question of the right of the Commission to determine its jurisdiction

to reopen the cases. In the oral argument, the German Agent, stated as follows—(Oral Argument, Nov. 21-25, 1932 p. 123):

"Under this Agreement the Mixed Claims Commission functions. *It derives its jurisdictional authority solely from the said Agreement.* The Agreement is the charter of the Commission, and consequently the jurisdiction of the Commission is defined as well as limited by the said agreement. Whatever the two Governments stipulated in the said Agreement as to the functions of the Commission and the proceedings of the Commission is binding upon the Commission. The Commission cannot modify, or alter, or deviate from any of the express provisions of said Agreement concerning its jurisdiction and the nature of its findings without the consent of the two Governments.

"The Commission is not a permanent international court. It does not function on the basis of general rules of procedure governing the proceedings before international tribunals or courts, nor can it take recourse as regards its jurisdictional authority to any other charter, agreement, or convention however general in nature.

"The Commission is a temporary body created for the specific purpose and entrusted by the two Governments with a specific and limited task, namely, to determine Germany's financial obligations to the United States arising out of the Treaty of Berlin, and for this purpose a specific charter was provided by the two Governments which defines the jurisdiction of the Commission. Therefore, the jurisdictional powers of the Commission are specifically defined in the Agreement of the two Governments of August 10, 1922. No other jurisdictional considerations or legal principles can apply.

247 "In Article VI of the said Agreement, in so far as it relates to the matter under consideration, the two Governments agreed and stipulated that 'The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.' This provision cannot be construed other than to mean that where the Commission handed down a final decision in a claim presented by the United States after the pleadings had been filed, the evidence has been closed, and the case submitted by both Governments for

final determination by the Commission, the decree of the Commission not only is final but also binding upon the two Governments."

No power or authority is given by this agreement to set aside a final and binding decision.

Even assuming that the question of jurisdiction is a justiciable one which the Commission can pass upon its decision as to its own concededly limited jurisdiction cannot of course foreclose another court from determining this question when in fact the Commission has exceeded its jurisdiction, and in fact at no time did the German Government concede that the Commission had the power to reopen, nor did it in any way consent to the reopening of the previous decision of the Commission.

Although the argument in 1932 was before the full Commission, consisting of Mr. Justice Roberts, Mr. Anderson and Dr. Kiesselbach, Justice Roberts did not assume to and did not decide the question until he had received a certificate of disagreement signed by the Commissioners. The certificates are to be found in the "Administrative Decisions and Opinions of the Mixed Claims Commission from October 1, 1926 to December 31, 1932."

On December 3, 1932, the Umpire, after receiving said certificate of disagreement, handed down the decision of the Commission dismissing the supplemental petition for rehearing on the ground that the new evidence was not sufficient to alter the decision of October 16, 1930, and on the question of jurisdiction stated as follows (Dec. 248 & Op. p. 1028):

"A matter upon which the Commissioners disagree is that of the jurisdiction of the Commission ever under any circumstances or for any reason to reopen a claim made under the international agreement of August 10, 1922, which created the Commission, once that claim has been formally passed upon and decided. The German Commissioner's position is that while the two Commissioners by mutual agreement may reopen in such a situation they may not do so where, as here, one of the Commissioners opposes the reopening. The German Commissioner does so oppose in this case. The conclusions I have expressed make it unnecessary to pass upon the question just stated. Equally unnecessary is it, in view of the foregoing, to discuss

whether the evidence offered, or some of it, falls within the class of evidence properly denominated after-discovered."

Petition of May 4, 1933 for Reopening and Rehearing.

Thereafter, a third petition for rehearing was filed, on May 4, 1933, copy of which petition for rehearing is attached to the moving papers, marked "Exhibit 3" which petition prays for

"the reopening and rehearing of the decisions in these claims; the United States reserving the right to complete the evidence . . ."

Thus, the sole relief asked for in this petition was

"the reopening and rehearing of the decisions in these claims."

The ground for the reopening was, as set forth in paragraph "I" of said petition for rehearing (Exhibit 3 of the moving papers on the application for summary judgment):

"I. That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants."

In the said prayer or application for rehearing, it is also stated that there were certain witnesses within the United States whose testimony the American Agent desired to obtain, and could not, be alleged, obtain at that time

249 without obtaining authority to issue subpoenas.

First Protest by German Ambassador Against Rehearing.

After said application for rehearing was filed, the German Ambassador transmitted the letter to the State Department, which in part reads as follows (p. 16 of moving affidavit):

"October 11, 1933

The German Government (as stated in the Embassy's note of July 6, 1933, and in my conversation on August 24, 1933, with the Acting Secretary of State, Mr. Wilbur J. Carr) considers petitions for rehearing in conflict with existing treaty provisions, as contained in paragraph 3 Art. VI of the agreement of August 10, 1922, between the United

States and Germany. The German Government regards the commission as being without authority to pass upon a difference of opinion which may exist between the two governments in this connection."

to which the position taken by the Department of State at that time is set forth in the letter of October 19, 1933 of the Department of State (p. 15 of the moving papers), stating that

"The question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself."

Decision of December 15, 1933

There were submitted two opinions of the American Commissioner and two opinions of the German Commissioner together with a letter of the then acting German Agent, Lohmann, to Mr. Justice Roberts, in which the following excerpt from the minutes of meeting of October 30, 1933, was quoted—(Report of American Commissioner, Dec. 30, 1933, p. 52):

"it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Umpire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government before the Commission."

250 Thereafter, Justice Roberts rendered his decision (Exhibit 5 annexed to the moving papers) in which it is stated (supra p. 63 and p. 74):

"The national Commissioners are in disagreement upon certain questions arising in these cases."

"2. I come now to the question of jurisdiction to reopen for the presentation of what is usually known in judicial procedure as after-discovered evidence. I am of opinion that the Commission has no such power."

Finally, he holds that the Commission has power to reopen in case its former decision was "induced by fraud."

In the cases referred to on page 19 of the moving affi-

davit, the reopening was on consent of both Governments by virtue of notes exchanged by the two Governments under date of May 7, 1934 and the question of jurisdiction was not raised. I do not admit that even by consent has the Commission power or jurisdiction to reopen its awards previously granted, to the detriment of any other award holder, and this contention is based upon the ground that each award holder when he receives an award immediately obtains a vested interest in the German Special Deposit Fund held by the Treasury. This contention is borne out by numerous decisions of the Commission upon application for rehearings in this and other cases to the effect that the Agreement of August 10, 1922 makes no provisions for reopening a final award.

It is true that a large amount of testimony was obtained under the Act of Congress passed June 7, 1933 (48 Stat. 117), which permitted the American Agent to subpoena witnesses. However, when this testimony was taken, the witnesses were not cross-examined by anybody representing the German Government because the German
251 Government took the position that the sabotage claims having been three times dismissed, the first decision of the Mixed Claims Commission of October 16, 1930 was final and conclusive and not subject to reopening and that, therefore, the taking of the testimony under the Act of June 7, 1933, was improper.

Decision of November 9, 1934 Denying Motion for Bill of Particulars and Limiting Issue to Allegations in Petition and Denials Thereof.

In connection with a motion made by the German Agent for a bill of particulars, the Umpire, on November 9, 1934, overruled the said motion for a bill of particulars. The decision reads in part as follows:

"I file herewith the certificate of disagreement and the separate opinions and supplemental opinions of the Commissioners, which have been prepared with the greatest care and have aided me in reaching my conclusion. . . . The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer."

Decision of July 29, 1935, Limiting Question Before the Commission to Reopening and Not on the Merits.

In the moving affidavit, it is stated that, prior to the argument in May 1936, the American Agent had requested the Commission to determine in the next proceedings not only the issues raised in the petition of 1933, but also the question of the liability of Germany on the sabotage claims. This request was made in a motion filed by the American Agent and on July 29, 1935, was overruled by a decision of the Umpire after the two National Commissioners "had certified their disagreement as to the action to be taken."

The opinion reads in part as follows:

252 "By the petition and answer an issue was framed.

This issue may be stated thus: 'Was the Commission misled by fraud practiced upon it'. If that issue be decided in favor of the claimants, the Commission should reopen the case upon the merits and reexamine the conclusions reached in the light of the whole record, including the proofs offered to impeach evidence forming part of the record when its decision on the merits was rendered. Obviously the case is not reopened by the presentation of a petition praying for such action. Especially is this true where the allegations of the petition are categorically denied. This the American Agent concedes. The decision of November 4, 1934 so recognizes. It is there said: 'The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer'.

"* * * The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing."

Decision of June 3, 1936 Setting Aside the Decision of December 3, 1932 and Confirming Limitation of Issue of Fraud.

Subsequently, an oral argument was had before the Commission, consisting of Justice Roberts, Dr. Huecking, and the American Commissioner Anderson, which argument extended from May 12, 1936 to May 26, 1936, and on June 3, 1936 the Commission set aside the decision of December

3, 1932, on grounds that had nothing to do with the charge of fraud, at the same time in its opinion restating that the proceedings remained strictly limited to the issue of fraud. It said (Exhibit 7 annexed to moving papers, p. 3):

"Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's Decision of July 29, 1935, be determined by a hearing, separate from and distinct from any argument on the merits. Both parties are entitled to file evidence (and to exchange briefs) as well in the proceedings in which a ruling for a reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted. Evidence filed and briefs submitted in the proceedings, in which a reopening is sought, must remain within the limitations set by
253 the Commission's Decision dated December 15, 1933."

The decision of December 3, 1932, which was thus set aside, was a decision merely to the effect that, if the new evidence then presented were formally placed before the Commission and considered in connection with the whole body of evidence prior to the Commission's opinion of October 16, 1930, the findings then made and the conclusions then reached would not be reversed or materially modified.

There is no dispute about the fact that this left the original decision of October 1930 in full force and effect, only subject to the granting of the motion then pending to rehear on the specific ground of fraud.

Attempted Settlement.

Thereafter, attempts were made to settle the case with alleged representatives of the German Government. The German Agent took the position that only agreed statements signed by him were valid before the Commission, and therefore the Commission refused to grant the American Agent's motion for awards based on the so-called "Munich Agreement." Said agreement of settlement was never consummated.

When the Old Award Holders were notified of the attempts to make this alleged settlement, an application was

made by the said award holders to intervene and be heard with reference thereto. At a hearing before the Commission, the Commission granted the said Old Award Holders permission to submit a brief, but in view of the fact that the German Agent, the authorized representative of the German Government, refused to carry out the alleged settlement agreement, it became unnecessary on the part of the Old Award Holders to intervene and their application under those circumstances, was denied.

254 *No Change From Limitation of Hearing on Issue of Fraud.*

The ruling quoted above from the opinion of July 29, 1935 was reiterated on June 3, 1936 with the following statement (Exhibit 7 annexed to moving papers, p. 3):

"Whether upon the showing made, the Commission should grant—rehearing, unless Germany shall agree to a different course, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits."

Germany never agreed to a different course.

The request that the Commission decide the merits of the sabotage claims was again made by the American Agent in his brief filed on September 13, 1938, but the German Agent in his brief filed in answer thereto on November 16, 1938 said as follows: (p. 1)

"At the end of his brief of September 12, 1938, (p. 113), the American Agent 'requests the Commission not only to set aside but to reverse the Hamburg Decision and thus render a final decision in favor of the United States in both cases.'

"In view of the history of the cases since the decision of December 3, 1932, it is utterly astounding that the American Agent sees fit at this moment to make such a request. In connection with the filing of evidence in 1935, the American Agent unexpectedly took the position that the Commission in its next hearing would have to pass upon the merits of the claims. When the German Agent opposed this view, the American Agent filed a motion asking that an order be entered informing the two Governments that the Commission, in its next hearing, would dispose of the claims on the merits. The Commission, in the decision of

the Umpire rendered on July 29, 1935, overruled the motion and said:

'If the claimants prevail upon that preliminary question (whether there has been fraud), the former decisions will be laid aside and the merits re-examined in the light of all the evidence * * *. The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a hearing be granted, will be quite a different thing * * *. Germany insists that the preliminary question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening vel non, and not upon the merits * * *.'

'When the Commission, in its opinion of June 3, 1936, set aside the decision of December 3, 1932, on grounds that had nothing to do with the charge of fraud, it attached importance to restating that the proceedings remained strictly limited to the issue of fraud; it said:

'Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits. Both parties are entitled to file evidence (and to exchange briefs) as well in the proceedings in which a ruling for a reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted. Evidence filed and briefs submitted in the proceedings, in which a reopening is sought, must remain within the limitations set by the Commission's Decision dated December 15, 1933.'

'In the light of this clear and concise language it would be wasting space and time to further elaborate on the self-evident proposition that in the next hearing nothing can be discussed and passed upon other than the 'comparatively narrow issue' of fraud.

"Should the request of the American Agent to pass upon the merits of the claims be construed as a request to reverse the decisions of July 29, 1935 and June 3rd, 1936 (the latter insofar as it confines the litigation to the issue of fraud), the German Agent wishes to state, that in that case he will request the Commission to review its decision of December 15, 1933 concerning the question of jurisdiction to entertain a petition for rehearing in a case finally
256 decided."

Consequently, the excerpt from the German Agent's brief, as set forth at the top of page 23 of the moving affidavit, is most misleading, as seeking to imply that Germany had consented to a different course. This implication is, therefore, wholly unjustified.

The American Agent repeated his request on January 27, 1939. Again, the German Agent said as follows: (transcript of Hearings, p. 901)

"Mr. Mitchell has suggested that in discussing these questions and confining the presentation of the German case to these questions, I pleaded to the merits of the case instead of pleading to the charge of fraud."

"Nothing could be farther from the actual situation."
(supra. p. 903)

"I, therefore, ask for a dismissal of the petition on each of the grounds set forth in the briefs of November 16, 1938 and January 14, 1939."

Therefore, in no respect has Germany ever consented that the decision on the merits should be considered before the Commission in its deliberations on whether the application for rehearing should be granted.

At all events the Commission had no jurisdiction and any alleged consent was wholly ineffectual.

Deliberation of the Commission

Thereafter, the Commission entered upon its deliberation solely on the question as to whether the application for rehearing should be granted, which application was based solely upon the petition of May 4, 1933, requesting merely

"the reopening and rehearing of the decisions in these claims." (see Exhibit 3 of moving papers, prayer for relief)

Under the Practice and Rules of the Commission therefore, no application except the application of May 4, 1933 could be regarded as before the Commission. (see Rule VI, subdivision b-1).

Resignation of German Commissioner During Deliberations on Single Question of Fraud and Before Disagreement Thereon.

On March 1, 1939, the German Commissioner notified the Commission of his retirement from the Commission. A copy of the correspondence on the part of the German Commissioner, the American Commissioner and the Umpire are annexed to the moving papers, with one important exception. The final letter of the German Commissioner, dated March 3, 1939, is omitted. I annex herewith as Exhibit B a copy of the said letter.

From this correspondence it appears very clearly that a status of disagreement between the two National Commissioners had not been reached, that the two National Commissioners were in the midst of their deliberation. The fact that the status of disagreement had not been reached and that the Commissioners were still in the midst of deliberations is clearly indicated from the letter of the American Commissioner, dated March 3, 1939, containing the following—(Minutes of June 15, 1939, p. 9):

"I am sure you will recall that, after several conferences had been held, the Umpire expressed himself in agreement with me, and we both informed you of our conviction that the decision at Hamburg had been reached upon false and fraudulent evidence, and that the proof of fraud was sufficient to set aside that decision and to reopen the case. Thereupon you argued that if, upon an examination of the whole case, both the new evidence and the old, the Commission came to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before the Hague, the present petition* would have to be dismissed. You then urged upon the Umpire and myself that we should consider the whole evidence for that purpose. It was thereupon agreed that we would proceed to examine the whole record to determine whether,

* In Exhibit 14 attached to moving papers, this word is written as "position."

upon the whole record, the American case had been proven. It was while we were examining this question that your action was taken." (Italics ours).

258 and the answer of the German Commissioner, dated March 3, 1939, annexed hereto and omitted as aforesaid from the correspondence annexed to the moving papers, and also omitted from the minutes of the hearing of June 15, 1939. Similar language is contained in the letter from the American Commissioner to Hon. Cordell Hull, dated March 3, 1939, which reads in part as follows—(Minutes of June 15, 1939, pp. 11, 12):

"I think it proper to give you the recent history of this case. The primary question now before the Commission is whether the decision which was reached at Hamburg, October 16, 1930, was induced by fraudulent and collusive evidence. In considering this question, the Commission has been operating under the decision of the Umpire rendered December 15, 1933. . . .

"As will be indicated clearly by my reply to Dr. Hueckling's letter, the subject of these conferences was whether the evidence which had been adduced had proven fraud which was sufficient to set aside the decision at Hamburg. During these conferences, I expressed to the Umpire and the German Commissioner my opinion that the decision at Hamburg had been reached on false and fraudulent evidence and that the proof of fraud was sufficient to set aside the Hamburg decision and reopen the case.

"After the conference had extended for a considerable time, the Umpire expressed himself in entire agreement with me on this proposition. Thereupon the German Commissioner argued that, if upon an examination of the whole record both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, the petition would have to be dismissed, and be urged upon the Umpire and myself that we should consider the whole evidence for that purpose. We thereupon proceeded to examine the whole record to determine from that record whether the American case had been proven. It was while the Commission was engaged in examining this ques-

tion that Dr. Huecking's action in regard to his retirement was taken." (Italics ours)

The last paragraph of the foregoing letter demonstrates without doubt that, when the German Commissioner resigned, the Commissioners and the Umpire in order to determine whether "the petition would have to be dismissed" were in the midst of an examination of the

259 "whole record to determine from that record whether the American case had been proven," and it was then that the German Commissioner retired.

No one can, therefore, properly say that, when the German Commissioner resigned, there was such a disagreement as authorized the Umpire to make an award.

This letter of the American Commissioner is an irrefutable concession that all three members of the Commission were in the midst of their deliberations and that no final conclusion had been arrived at by any of the Commissioners and, therefore, the Umpire was not in a position to exercise his function of deciding the matter allegedly in dispute within the meaning of paragraph VI of the agreement by which the Commission was established.

Meeting on June 15, 1939 Including Granting Petition of May 4, 1933 and Ex Parte Granting of Awards Without Hearing on the Merits.

No new German Commissioner had been appointed and the next step taken so far as I know was the issuance of the notice of meeting of the Commission on order of the American Commissioner, which notice was dated June 7, 1939, and which notified the German Agent of a hearing to be held on June 15, 1939.

The giving of this notice by the American Commissioner is entirely irregular. Notices of meetings under Article III of the Agreement of August 10, 1922 cannot emanate from one commissioner, in this instance, the American Commissioner, but must be designated by the Commissioners.

The German Embassy, through its Charge d'Affaires, Thomsen, on June 10, 1939, notified the Department of State that, in view of the resignation of Dr. Hueck-

260 ing,
"The Commission has been incompetent to make decisions and that consequently there is no legal basis for

a meeting of the Commission at this stage" (Minutes of June 15, 1939, p. 15).

A translation of this letter is set forth in full at page 25 of the moving affidavit.

This letter was misconstrued by the American Commissioner at the hearing on June 15, 1939, as a statement on the part of the German Government that it does not intend to participate any further in the work of the Mixed Claims Commission, United States and Germany, as provided for by the agreement of August 10, 1922.

Such construction of the said letter and of the correspondence and the letters of the German Commissioner Huecking is totally unwarranted. The German Government has fully indicated by its letter to the Department of State, hereinafter referred to, of July 11, 1939 and of October 3, 1939, that Germany had full intention of proceeding with its share of the work of the Commission as soon as the irregularities referred to in these letters would be rectified. To this effect, see the following language in the letter of October 3, 1939, annexed to the moving papers, where the Charge d'Affaires says as follows—(Minutes of October 30, 1939, p. 53):

"By direction of my Government, I should like to express the hope that the United States Government does not approve of the violations of procedure discussed in this note and that it will find some way of quashing them, in order to restore, in collaboration with the German Government, the basis existing before the beginning of those violations of procedure, upon which the proceedings can be brought to a conclusion in an orderly way."

On June 15th, 1939, the American Commissioner rendered an opinion which was spread upon the minutes, in which he asserted that there had been a disagreement between him and the German Commissioner and simultaneously filed a Certificate of Disagreement, signed 261 solely by him. This statement that there had been a disagreement, when as a matter of fact, as above indicated, the two Commissioners were in the midst of their deliberations, is not warranted by the facts and under the rules of the Commission the Umpire was not authorized to decide the case upon a certificate signed solely by the American Commissioner. There is no provision for a Cer-

tificate of Disagreement signed solely by one Commissioner. Examination of the records of the Commission shows that each Umpire acted only on the certificates of the two National Commissioners.

The American Commissioner, in his opinion, also states that the retirement of the German Commissioner on March 1, 1939, did not render the Commission *functus officio*. We will assume that the Commission was not rendered *functus officio*, but the American Commissioner could not issue Certificates of Disagreement alone; nor could the Umpire render decisions until a new Commissioner was appointed, and the intention to appoint a new Commissioner in the place of the former German Commissioner fully appears from the letter of the German Charge d'Affaires above mentioned. However, the Umpire, disregarding the rules of the Commission and adopting the views of the American Commissioner, handed down his decision. As stated in the moving affidavit (p. 30) the Umpire stated in his opinion that within the meaning and intent of the agreement by which the Commission was constituted and its powers defined, there existed a disagreement between the two National Commissioners. This statement is, for the above reasons, unwarranted.

He also stated that he participated at the conference after submission of the cases and that he was cognizant of this disagreement. This statement is also unwarranted
262 and under the rules of the Commission requiring a certificate from the two Commissioners, as has always been the practice, the Umpire had no authority to act, and his statement that "if more were needed" he had before him the certificate and opinion of the American Commissioner, indicates an unjustified precipitateness on the part of the Umpire. In his opinion he grants the motion for reopening, but under the agreement under which the Commission was constituted and under the rules he was without power, for the reasons already stated, to grant said motion, more especially because at the time of granting the motion the work of the Commission had been, by reason of the resignation of the German Commissioner, suspended until the appointment of a new German Commissioner.

Article II of the Agreement of August 10, 1939 provides "should the Umpire or any of the Commissioners die or

retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him." The American Commissioner did not wait for the vacancy to be filled before calling the meeting of June 15th.

Although it appears clearly from the record, as above outlined in this affidavit, the sole question before the Commission was whether the previous decision of the Commission dismissing the claims should be reopened and set aside, and although the Commission had never been called upon to deliberate as to the merits of the claims, and although the question of the merits had been expressly reserved by former decisions of the Commission, the Umpire granted the oral motion of the American Agent at said hearing of June 15, 1939, that awards be granted in favor of the sabotage claimants. The motion for an award on the merits was granted, based upon the ground that by virtue of
 263 the resignation of the German Commissioner, Germany

"seeks to avoid a final conclusion and frustrate the work of the Commission". (Minutes of June 15, 1939, p. 21).

In view of the fact that there had been not even a deliberation on the merits of the claims and in view of the fact that the question of the merits of the claims had been expressly reserved, and in view of the fact that no notice of the application for a hearing on the merits or for an order directing a judgment on the merits had been served on anyone, the Umpire was without power to grant the last mentioned motion.

Article VI of the Agreement reads as follows:

"The two Governments may designate agents and counsel who may present oral or written arguments to the commission."

"The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim."

"The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments."

and Rule VI reads in part as follows:

"Hearings.

"(a) The order in which cases shall come on for submission before the Commission shall be determined by (1) agreement between the American Agent and the German Agent, subject to revision in the discretion of the Commission; or (2) order of the Commission.

"(b1) All briefs shall be confined to questions put in issue by the petition, memorial or written statement filed by the American Agent and the answer thereto filed by the German Agent."

Consequently, the granting of the motion by the Umpire entirely ex parte was an act totally unauthorized under the Agreement of August 10, 1922 and under its procedural rules and was therefore null and void.

264 On page 31 of the moving papers there is set forth an excerpt from the minutes of the meeting of June 15, 1939, numbered "Paragraph 1. 2. and 3." An examination of the minutes discloses that this so-called order was spread upon the minutes after the hearing and is, therefore, not a correct transcription of the proceedings on that day. The minutes of the hearing of June 15, 1939 read as follows—(pp. 20, 21):

"The American Agent. If your Honors please, in view of the attitude of Germany, as expressed in the communications between the German Commissioner and the Umpire and the American Commissioner and the communication between the German Embassy and the Secretary of State of the United States, it is apparent that Germany does not intend to take any further part in the proceedings before this Commission, and seeks to avoid a final conclusion, and frustrate the work of the Commission. I therefore move at this time, if your Honors please, upon the record as it now stands, that awards be entered in accordance with the opinions which have been rendered today.

"The Umpire. In view of what appears in the record, and based upon the American Agent's motion, the Commission is prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form. Those may be submitted, and if approved will be made at a further meeting to be called on notice."

The Umpire thus stated that "the Commission is prepared to sign awards to be submitted by the American Agent, if approved by the Commission as to form. Those may be submitted and if approved will be made at a further meeting to be called on notice.

According to the minutes as quoted by Mr. Martin in the moving affidavit, the awards were to "be considered at a further meeting of the Commission to be called on notice, and appropriate action thereon * * * taken". There is nothing in the record to indicate what consideration was given to these awards "at a further meeting of the Commission", or when this further meeting took place, nor is there anything in the minutes to indicate what proof was presented to the American Commissioner or to the

265 Umpire with regard to the alleged damage suffered by the sabotage claimants. The award to the Lehigh Valley Railroad Company (Exhibit 23 annexed to the moving papers) and the Agency of American Car & Foundry Company, Limited (Exhibit 24 annexed to the moving papers) both state that "the Agent for the United States and the Agent for Germany having been heard"; Mr. Martin at page 10 of the moving affidavit admits that the question of the measure of damages was to be postponed until after the determination of the question of Germany's liability. The only question which was before the Commission at the time of the resignation of the German Commissioner was whether the decision of October 16, 1930, would be set aside on the ground of fraud. There had been no argument on the merits and consequently no counter-proof or argument on the amount of damages.

Letter from the German Charge D'Affaires Protesting Irregularities and Showing Germany's Willingness to Participate in Proceedings Before the Commission.

The next steps in the chronology of events were the letters of July 11th, 1939 and October 3, 1939, from the German Charge d'Affaires to the Department of State, both of which letters were received by the American Commissioner, and apparently by the Umpire, and the Department of the Treasury: Annexed hereto is a translation of the letter of July 11, 1939, marked Exhibit C. In this letter the German Embassy called the attention of the Depart-

ment of State to irregularities in the proceedings of the Commission, called by the Charge d'Affaires "The Rump Commission". He further calls attention to the fact that in the minutes of the Commission the letter of March 3, 1939, from the former German Commissioner, is
266 omitted. In this letter of July 11, 1939, he states as follows:

"According to communications received by the German Embassy, the American Agent as well as the attorneys of the American and Canadian claimants in the Black Tom and Kingsland cases are engaged in preparing awards to be submitted for signature to the Rump-Commission consisting at the present time of the American Umpire and the American Commissioner. These steps are the direct result of a ruling made by the American Umpire at the meeting of the Rump-Commission on June 15th, 1939, granting without hesitation a motion of the American Agent for awards and stating that 'the Commission is prepared to sign awards to be submitted by the American Agent if approved by the Commission as to form'.

"In view of the Agreement entered into between the German Government and the Government of the United States on August 10, 1922, as well as in view of two unambiguous decisions of the fully constituted Commission and an Agreement between the two Agents concerning the procedure to be followed in the instant cases, this ruling of the Umpire is an inconceivable occurrence which is without precedent in the practice of international Tribunals and Commissions. The issues, involved in this ruling, namely, the issue of Germany's responsibility for the damages arising from the explosions and fires and the issue of the amount of damages, were not before the Commission in the pending procedure dealing with the third petition for rehearing. On the contrary, they have been reserved for later stages of the proceedings in which Germany has the right to file evidence and briefs."

He also points out:

"It is patent that the ruling of the American Umpire relative to the entry of the awards as well as any award that might be signed by the Rump Commission consisting of the American Umpire and the American Commissioner, is null and void."

In this letter he protests against the "American Umpire's ruling to granting awards in favor of the American and Canadian claimants". He again calls attention to further irregularities, more particularly the unilateral calling of a meeting by the American Commissioner and the decision of the American Umpire on the petition for rehearing of May 4, 1933 "which is likewise void".

267 *Letter of October 3, 1939 From German Charge D'Affaires Protesting and Setting Forth Irregularities and Germany's Willingness to Cooperate in Work of the Commission.*

On October 3, 1939, a further letter of protest was sent by the German Charge d'Affaires to the Department of State (copies of translations of which were sent to the Department of Treasury and to the American Commissioner and to the Umpire prior to the calling of the meeting of October 30, 1939, hereinafter mentioned). A copy of translation of this letter is set out in full as Exhibit 27 annexed to the moving papers.

I briefly summarize said letter as follows:

After calling attention to the fact that in its previous letter of July 11, 1939, it asserted that the German Government regarded the awards of the Rump Commission as void, it calls attention to the fact that, although the claim of the Lehigh Valley Railroad Company was filed after the time for filing had expired, the German Government consented to the consideration thereof by the Mixed Claims Commission, which would not have been possible without the German Government's assent.

Then the note calls attention to the various "violations" committed by the Commission as follows:

In the first place, and according to the agreement between the German Government and the United States Government, the decision of October 16, 1930 was to be accepted by both Governments as final and binding, and despite the provision in the agreement that the decisions of the Mixed Claims Commission shall be final and binding, the American Agent submitted three applications in succession for reopening, the first two of which were rejected, and the third application the subject of the last proceeding.

In these proceedings, the letter further states, the following "violations" were committed:

First: There was no legal basis whatever for the unilateral manner of the American Commissioner calling for the "session of the Commission"; that during the vacancy in the position of the German Commissioner, the Commission was incompetent to make a decision and, therefore, could not assemble for meetings, Article 3 of the agreement between the two Governments providing:

268 "They (the National Commissioners, may fix the time and place of their subsequent meetings according to convenience."

Accordingly, he asserts that the American Commissioner and the Umpire had no power without the collaboration of the German Commissioner to call meetings or hold sessions.

In connection with this "violation" of the agreement, the letter stated as follows:

"* * * In none of its communications has it" (the German Government) "taken the stand that by the withdrawal of the German Commissioner the Commission has become 'functus officio' and has thereby lost its competence."

The sole question was whether, during the vacancy of the position of the German Commissioner, the American Commissioner, whether alone or jointly could exercise functions which the agreement had entrusted to the two Commissioners for joint exercise.

Second: Another "violation" was the manner of action of the American Commissioner in the first matter which he treated at this meeting with the American Umpire. He made public a summary of the letters which he himself and the American Umpire had exchanged early in March 1939 with the German Commissioner, and on the basis of such correspondence, the American Commissioner made the assertion that the "stage of disagreement" had already been reached in the discussions of the Commission. That the American Commissioner had omitted from the picture the letter of the German Commissioner of March 3, 1939, which directly contradicts the assertion that the German Commissioner had dissented in the deliberations. This letter which was omitted showed the incorrectness of the stand of the American Commissioner. Failure to make known the position of the German Commissioner in opposition to

the unilateral declaration of the American Commissioner "deprives the subsequent acts of the American Umpire of any legal basis".

Third: That the sabotage cases were not at a stage in which the American Umpire had authority to make a decision; that the functions of the Umpire are limited by the agreement of August 10, 1922, as well as by the Rules of Procedure, and that the Rules of Procedure require a formal disagreement by the two Commissioners and a certificate in written form by both of them.

Fourth: In view of the attitude of the Umpire, it further asserts, in effect, that the German Commissioner properly made use of his right of withdrawal.

269 It is pointed out that this attitude was demonstrated by the German Commissioner in his letter to the American Umpire of March 1, 1939, in which he, among other things, asserted (Minutes of Hearing of October 30, 1939, p. 37):

"... In respect to the latest of our claims you introduced as your main point a point which was not made by the claimants at all and which, as far as I am aware, never was argued ... I cannot shut my eyes to the fact that in my opinion it is not compatible with the position of an umpire and it shows a bias if the Umpire makes points and bases his decisions on them which are not advanced by the party favored by them. The Umpire actually assumes by such a procedure the attitude of a legal adviser for the favored party and does so under circumstances under which the other side can no longer expect equal justice.

"... It has become clear to me during these days that any argument advanced by the claimants at once attracts your attention and evokes the idea, How could it be collaborated? And any argument advanced in favor of the defendants at once evokes in you the idea, "How can it be refuted?"

It further asserted that an examination of the "decision ... discloses the character of a document in which the German Government is viewed and treated as an opponent in litigation."

It also asserted that the Umpire refers to the thesis upon which the decision of the Rump Commission is vested, namely, that the Black Tom and Kingsland cases are

proven if the so-called Herrmann report is genuine. On this point, he further asserted that the American Commissioner merely states in his decision that this consequence is admitted. The letter further stated that the German Agent, by whom alone such an admission could be made, never made such a statement, and then he further asserted that the Umpire has shown a complete reversal of his former views regarding the Herrmann report. He demonstrates that, after having asserted his previous opinion with regard to the Herrmann message (Minutes of Hearing of October 30, 1939, p. 41):

"... The silent but *persuasive intrinsic evidence* makes it impossible to reach a conclusion in favor of the claimants and against Germany",

the Umpire now states that further study had converted him to the opinion that the *intrinsic evidence* confirmed the genuineness of the Herrmann report.

270 Fifth: That the American Umpire violated all principles of international law in his treatment of the case of the Agency of Canadian Car & Foundry Company, Ltd. Although it was absolutely clear to the Commission that all of the shares of the stock of this corporation belonged to a Canadian corporation, the Umpire denied the motion to dismiss this claim, although it did not fall within the jurisdiction of the Commission.

Sixth: And although in the last arguments before the Commission, the procedure was limited strictly to the preliminary question of fraud, and although the German Agent had refrained from submission of counter-evidence on all points which were irrelevant to the preliminary question of fraud, that is, on the question of responsibility of Germany, and although this course of procedure on the part of the German Agent was in accordance with the decision of the Umpire of November 5, 1935, and he, therefore, refrained from discussing in his written statements or arguments the responsibility of Germany on the merits, and although, in the order of the Commission of March 29, 1929, Rule 3, counsel would be given an opportunity to discuss an oral argument or submission of printed briefs within a time to be fixed by the Commission any points not previously covered, such opportunity was not afforded him.

Seventh: The proceedings with respect to the amount of damage allegedly caused were entirely irregular, in view of the reservation of the question of damage until a further stage of the proceedings. In spite of the stipulations to that effect, the American Commissioner, he asserts, moved that the awards be granted in favor of the private parties interested, and said motion was granted. This motion was granted, he asserts, although these important questions had never been submitted to the Commission for decision by the two National Agents, and he calls attention to the previous ruling of the Commission as follows: (Minutes of Hearing of October 30, 1939, p. 48):

"The Commission has from its inception been sensible of its lack of power to compel the closing of the record and the final submission of any case . . . It has never, as I am advised, entered an order for the final closing of the record in any case without consent or over objections. *I do not think it has power to do so.*"

and he further stated (supra, pp. 49, 50):

"The statement made by the American Umpire shows clearly that investigation of the sums of damages, 271 established unilaterally by the complaining party and without possibility of opposition, would refer only to certain requirements as to outer form, but not to the material establishment of the amount of damages—and this in a litigation between two sovereign Governments, in which the uninvestigated claims amount to approximately \$40,000,000!"

He further stated that the assertion that it is apparent that Germany does not intend to take any further part in the proceedings is not borne out by the facts, as demonstrated in the note of June 10, 1939, and he further asserted (supra, p. 51):

"... the statute of the Commission establishes the principle that the discussion and investigation of all matters brought before it is in the first place exclusively the business of the two National Commissioners. They compose the Commission. The Umpire can act only under certain fully defined conditions, and his duty is strictly limited to deciding on all cases in which the Commissioners might be of different opinions."

and he closed his letter with the following statements (supra, p. 52):

"Accordingly the acts and orders of the American Umpire and the American Commissioner since March 1, 1939, among them the reopening of the proceedings in the Black Tom and Kingsland cases, the 'decision' of the Umpire and the American Commissioner on the responsibility of Germany in both cases, and the arbitrary granting of awards by the American Umpire, are null and void. Any awards which the American Umpire and the American Commissioner might issue on the basis of these measures are likewise null and void."

(supra, p. 53):

"By the direction of my Government, I should like to express the hope that the United States Government does not approve of the violations of procedure discussed in this note and that it will find some way of quashing them, in order to restore, in collaboration with the German Government, the basis existing before the beginning of those violations of procedure, upon which the proceedings can be brought to a conclusion in an orderly way."

272 *Meeting of October 30, 1939 Including Submission and Signing of Awards After Ex Parte Proof of Damages.*

Notwithstanding this letter of protest and notwithstanding that this letter contained the statement above mentioned that the German Government was willing to continue to collaborate in the work of the Mixed Claims Commission, on October 23, 1939, the American Commissioner caused the American Joint Secretary to deliver personally to the German Agent a notice of the meeting to be held on October 30, 1939. This notice was signed by the American Joint Secretary in accordance with the direction of the American Commissioner. This procedure is again irregular on the same ground as the notice of the hearing held on June 15, 1939.

At the meeting of October 30, 1939, there was presented to the Umpire an award in each of the 153 sabotage cases. In presenting the awards, the American Commissioner stated (Minutes of October 30, 1939, p. 25):

"I have thoroughly examined the files for the purpose of determining the correct measure of damages in all of these cases, and have furnished the Umpire memoranda relating thereto. I have also furnished him a memorandum prepared by the Acting American Agent relating to the question of damages.

"Wherever the files disclosed that a question of fact or of law was raised, I have discussed it with the Umpire personally. I have presented to him for his consideration an award in each of the 153 sabotage cases."

This was followed by the following remark of the Umpire:

"The Umpire: After a study of the data and the records and the memoranda prepared, I have found that the awards are, in my judgment, accurately and properly calculated, and have joined the American Commissioner in signing the awards. They will be accordingly filed in the records of the Commission."

Neither the German Commissioner nor German Agent attended the said bearing, nor was the German Agent
273 or the German Commissioner in the slightest way consulted as to the amount of the awards, the measure of damages, the validity or correctness of the proof of damages, nor is there anything in the record of the Commission to indicate how they were arrived at, the rules applicable thereto, what witnesses, if any, were heard, whether there was any investigation by the American Commissioner of the correctness of the proof, whether there were any witnesses heard, whether any testimony was taken—in other words, the amount of damages fixed in the awards was arrived at entirely ex parte.

I am informed that the only steps taken on the part of the American Commissioner in determining the amount of the awards were consultations with the American Agent and his counsel and conferences with counsel for the private claimants, at which consultations and conferences no one representing any of the parties adversely affected or representing the old awardholders, or their counsel, was present. I am further informed that no notice to attend these consultations was given to the German Agent. In other words, I am informed that the amount of damages appearing in the awards was not the subject of any for-

mal or informal hearing. I have had correspondence with Mr. Harold H. Martin in which I requested information concerning the method of computation used in arriving at the awards and received from him no reply to my request for information, although he did reply to the letter.

In order to inform the Court fully on the subject of how the amounts of the claims were arrived at, so that the Court will be exactly informed, I demand the examination of Mr. Martin and I have caused to be served a notice for his examination, and I am sure this examination will reveal not only the irregularities of the procedure, but also, the fact that there was no opportunity for counter-proof, and
 274 that by coincidence or otherwise the amount of the awards reached a figure which will consume approximately the entire sum available in the Department of the Treasury, to the detriment of the old American awardholders. In the interests of justice and of the fairness of decisions of international tribunals, I assert that it is necessary that this examination be had so as to disclose to the Court the facts as to the manner in which the old awardholders are deprived arbitrarily of the payment of the balance due on their claims.

It is stated in the moving affidavit that extensive proof of damages suffered by the sabotage claimants consisting of material contained in the memorials of the respective claimants, and evidence in voluminous exhibits filed with the Commission for the period from approximately March 1927 to November 1936 was in the record at the time of the retirement of the German Commissioner. These alleged proofs consist of ex parte affidavits, and there is no counter-proof on the question of damages. Because of the stipulation not to take up the question of damages until the liability of Germany was established. The German Agent never undertook to submit counter-proof.

In the moving papers it is stated that no evidence respecting damages was submitted to the Commission subsequent to November 1936. The reason that further evidence was not submitted was that, as stated in the affidavit of Mr. Martin, the amount of damages was a subject expressly reserved until the liability of Germany had been established (see moving affidavit p. 10).

The Award to Agency of Canadian Car & Foundry Company, Ltd., a New York Corporation, Whose Stock is Entirely Owned by a Canadian National, Without Deliberation of the Commission.

As to the claim of the Agency of the Canadian
275 Car and Foundry Company, Ltd., a motion was made by the German Agent to dismiss this claim. With reference to this motion the German Commissioner in his letter of March 3, 1939, has written as follows:

"How far we were from any agreement or disagreement may be best evidenced by the fact that none of us had even touched upon the subject of the nationality of the Canadian Car Agency, although you yourself will hardly entertain any doubt that this question of jurisdiction or may be of the substance of the case would be a part and topic of any decision, be it as to fraud or be it as to merits, in the Kingsland matter."

Therefore, there had been no deliberations of the Commission on this Claim subsequent to the hearing in January 1939. Apparently, the American Commissioner presented to the Commission on this subject, an ex parte certificate and his opinion in connection therewith. Upon presentation of said certificate the Umpire granted the award of the Agency of Canadian Car and Foundry Company, Ltd. for \$5,871,105.20, with interest thereon at 5% from January 31, 1917. The amount claimed was \$6,956,865.80. The award is annexed to the moving papers as Exhibit 24.

The German Agent had moved to dismiss the claim on the ground that the Commission had no jurisdiction to entertain the same because the shares of stock of said claimant were fully owned by the parent company, the Canadian Car and Foundry Company, Ltd.; a Canadian Corporation, and this motion was pending at the time of the resignation of the German Commissioner. It had not been considered by the two National Commissioners, so therefore, no agreement or disagreement was reached or certified.

At pages 11 and 12 of the brief submitted by the German Agent under date of January 12, 1939, certain facts, among them:

276 "1. Throughout its life, the 'Agency' was entirely Canadian-owned, all of its shares belonging to the Canadian parent Company.

"2. The 'Agency' was Canadian-managed; its President, its Vice-President, and the Chairman of its Board of Directors were citizens of Canada and appointed by the Canadian parent Company. The President and Vice-President of the "Agency", Mr. Nathaniel Curry and the late Mr. W. W. Butler were identical with the President and the Vice-President of the Canadian parent concern.

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"5. The 'Agency' was not allowed to engage in any other business than the performance of the Russian ammunition contracts. Its existence was to cease upon completion of the contracts early in 1917."

"6. The 'Agency' performed the work assigned to it 'in trust' for the Canadian parent Company; the 'Agency' also held its property only in trust for the Canadian parent Company, to which all property and remaining proceeds were to be turned over upon the completion of the Russian contracts.

.

"9. The British and the Russian Governments, through the officers of the Anglo-Russian Supply Committee, exercised direct influence on the management of the 'Agency' and the operation the Kingsland Plant."

This shows that the Agency of Canadian Car and Foundry Company, Ltd. was not only wholly owned by the parent company, a Canadian corporation, but that any and all profits would be paid to the parent Company. Therefore the fact is that every cent of the award thus obtained would be paid into the coffers of the parent Company, a Canadian corporation. In other words, it appeared distinctly

277 that our Government (Department of State and the

"2 See Paragraph 3 of the stipulation between the Canadian parent Company (the assignor), the Russian Government and the "Agency" (the assignee) recited in the record of the case of the Robert Dollar Company:

"Paragraph 3."

"That the Assignee shall engaged in no other business than the performance of the two said recited contracts; and that, after the performance of the two said recited contracts, all property or proceeds remaining shall belong to and be assigned or paid by the assignee to the assignor."

American Agent) sponsored a claim of a corporation, every one of whose shares of stock was impressed with Canadian nationality. As aforesaid, the motion of the German Agent was based upon the fact that if an American corporation is wholly owned by a non-American national, under the rulings of the Commission, it had no jurisdiction to entertain the claim.

The administrative rulings of the Commission and the Department of State have made it clear that some American interest in an American corporation is a primary requirement for jurisdiction to render an award to an American corporation, and then awards are made only to the extent of such American stock ownership. No right to recover can exist when the record shows that no part of the stock of a corporation is owned by Americans. *In a memorandum filed by the American Agent on May 13, 1926, the following language is used by him:*

"The class of foreign-owned corporations to be excluded from the treaty.

"Diplomatic protection has been refused to a corporation incorporated in the United States because of foreign stock ownership. Such a refusal might be proper *in the case where all, or substantially all, of the shares were owned by some foreign corporation and the American corporation was merely the agent of its foreign principal.* In that case the Commission might well come to the conclusion that the claim was in substance that of a foreign corporation which had been put forward by the American subsidiary merely to make a case within the jurisdiction of the Commission.

Under this language and under the rules of the Commission, only a corporation, some of whose shares are impressed with American nationality, can file a claim, and when a claim is filed by a corporation none of whose shares is impressed with American nationality, the Commission has no jurisdiction.

278 By reason of the fact that the Agency of Canadian Car and Foundry Company, Ltd. has received this award, there has been an improper discrimination in its favor as against other corporate claimants whose claims have either been entirely dismissed or entirely disregarded by the American Agent or made the subject of partial

awards because of the non-ownership of the stock, or part of the same, by American nationals. *In fact, in presenting the corporate claims belonging to corporations for filing with this Commission, it is a requirement to enumerate specifically the nationality of the owners of the shares of stock of the corporation.* It appears on page 13 of the minutes of October 30, 1939, as follows:

"7. (a) *At the time the claimant acquired the claim the shares of stock were held by Canadian Car and Foundry Company, Ltd., the proportion of the shares of stock in that company held by citizens of the United States was approximately 30%, and the proportion of stock held by citizens or subjects of any other country at that time was 30% in Canada, and 40% in England.*

"8. (a) *At the present time the shares of stock of claimant are held by Canadian Car and Foundry Company, Ltd., and the proportion of the shares of stock in that company held by citizens of the United States is approximately 45% and 55% by aliens.*" (Italics ours)

While it does not state in the answers above quoted that the Canadian Car and Foundry Company, Ltd. is a Canadian corporation, this is common knowledge. It has its main office at Montreal, Canada. And notwithstanding this statement, the Agency of Canadian Car and Foundry Co., Ltd. has received an award for practically the full amount of its claim. How this award can be reconciled with the previous rulings of the Commission, it is difficult to understand. Furthermore, it is well known that pursuant to an administrative ruling of the Department of State a full statement of the nationality of the owners of the stock of corporate claimants must be presented in support of claims
279 against any foreign government.

Prior Awards Limited to American Interest in Corporations

There were several cases before the Mixed Claims Commission, in which the American Agent consented that the awards were to be limited strictly to the American stock ownership in the corporation.

In the case of H. Herrmann Manufacturing Company, Docket #173 the claim was withdrawn by the American Agent on behalf of the Department of State because the stock was 95% foreign owned.

In the American Congo Company, Docket #504, a compromise was made between the two Agents, which compromise amounted to 36.75%, being the American interest in the award.

In the Gans Steamship Line, Docket #6625, the Commission found that only 80% of the claim was impressed with American nationality and accordingly made an award for that interest.

I have been advised that the Department of State, in a letter dated April 16, 1938, stated as follows:

"First. Nationality of shareholders of the various corporations concerned. The record indicates that the original charterer, the United States Asphalt Refining Company, and the sub-charterer, the Interocean Transport Company, were corporations organized under the laws of South Dakota and that, on or about May 11, 1917 (after the date of origin of both claims), the last named corporation was merged in the claimant company, the Interocean Oil Company. It was stated, moreover, on May 16, 1923, that all stock of the claimant company was held by American citizens both at the date of the origin of the claim and on the date of that statement. However, the evidence does not disclose the names of such stockholders, the proportions of their respective holdings, nor how they acquired American nationality. Nor does it include any copies of the resolutions of the stockholders of either of the corporations showing the circumstances or effect of the merger. The record would appear to be incomplete without the best available evidence on those points."

280 From the above letter it is quite evident that in other cases before the Mixed Claims Commission the Corporations were required to prove that all stock was held by American citizens, both at the date of the origin of the claim (in this case 1917) and at the date of the filing of the claim.

I want to examine Mr. Martin, to put before this court a list of all the cases which have not been prosecuted by the American Agent because of foreign stock ownership.

The Commission had no jurisdiction to make an award unless it is limited to the American stock ownership in these respective companies.

The nationality of the corporation is not considered; it is the nationality of the stockholders. It was never intended

that in using a corporate veil a Canadian national should be the beneficiary of American awards to the detriment of other American Award Holders, relying upon a specific fund as the sole present source from which its payment will be derived.

Awards to Insurance Companies Partially Foreign Owned.

It is further alleged in the complaint that many of the corporate claims are those of insurance companies who are claimants by reason of subrogation after paying the awards of persons allegedly damaged by the Black Tom and Kingsland explosions. It is alleged in the complaint that many of the shares of these subrogee insurance companies are foreign-owned. As far as I know no investigation has been made as to the extent of such foreign ownership. These insurance companies, whose names are at present unknown to me, have received awards to the detriment of the Old Award Holders in the same manner as the Agency of Canadian Car and Foundry Company, Ltd. and in order to prove
281 this assertion it is necessary for the plaintiff to examine Mr. Martin and other witnesses.

Plaintiff's Claim Correctly Set Forth in Complaint.

On page 36 of Mr. Martin's affidavit, he correctly sets forth the various amounts awarded to the plaintiff, Z. & F. Assets Realization Corporation, by the Mixed Claims Commission, but gives the impression that the plaintiffs have already received more than the total amount of their awards.

With the exception of the award of \$4,074.00, which was entered on November 9, 1928, all of the awards were entered prior to the passage of the Settlement of War Claims Act, by which the holders of awards received payments on account. Three of the first four awards entered by the Mixed Claims Commission in favor of the plaintiff, Z. & F. Assets Realization Corporation, carry interest at 5% per annum from January 1, 1920. The fourth award is with interest at 5% from June 30, 1920.

Section 2(b) of the Settlement of War Claims Act reads as follows:

"(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon in accordance with the award, accruing before January 1, 1928."

The interest accruing prior to January 1, 1928 has always been regarded by the Treasury Department in its statements to awardholders and in Treasury reports issued by it, as part of the principal. This is also borne out by Section 4(c) (4) and (5) of the Settlement of War Claims Act:

"(4) To pay the amount of \$100,000 in respect of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of \$100,000 and is not payable in full under paragraph (2) of this subsection. No person shall be paid under this paragraph and paragraph (3) an amount in excess of \$100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

"(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid. Pending the completion of the work of the Mixed Claims Commission, the Secretary of the Treasury is authorized to pay such installments of the payments authorized by this paragraph as he determines to be consistent with prompt payment under this paragraph to all persons on behalf of whom claims have been presented to the commission;"

There was, on January 15, 1936, a total aggregate unpaid balance of \$599,373.96, consisting of \$311,870.47 as balance of award and interest to January 1, 1928, and \$287,503.49 interest from January 1, 1928 to January 15, 1936. Interest at 5% from January 15, 1936 on the unpaid balance of award with interest to January 1, 1928 is approximately \$62,000, making total unpaid balance of more than \$650,000.

Special Deposit Account Consumed by Sabotage Awards.

There is still due to the old American award holders a sum in excess of \$63,000,000, and I have been informed that the

moneys now in and available to the Special Deposit Account do not exceed \$22,000,000. The awards to the sabotage claimants including interest to January 1, 1928, exceed \$31,000,000; and hence, if the awards to the sabotage claimants stand, the entire Special Deposit Account will be consumed by payments to them, and the Old Award Holders will receive nothing on account.

283 With regard to the excerpt from the report of the United States Finance Committee dated June 6, 1934, (Senate Report No. 1376, 73rd Congress, 2d Session, p. 7), the reservation of the German Special Deposit Account to make payment on account of any awards of the Mixed Claims Commission was made to provide for the contingency of proper awards obtained in a proper manner, after proper hearing and after proper procedure. Never was it contemplated that it should await the payment of awards obtained ex parte and partly payable to non-American nationals.

I therefore ask that the motions of the defendant-intervenor be dismissed.

HUBERT E. ROGERS

Sworn to before me this 12th day of December, 1939.

HELEN M. MALLOY

(Seal)

Notary Public, Queens Co.

Queens Co. Clk's No. 3726, Reg. No. 5667
Certificate filed in N. Y. Co. No. 1252, Reg. No. 0M769
Commission expires March 30, 1940

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Exhibit "A"

Docket Nos. 8103, 8117, et al.

Mixed Claims Commission Decisions.

UNITED STATES OF AMERICA on behalf of Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters, Claimants,

v.

GERMANY.

These two cases involve claims for damages resulting from fires. The first relates to the fire which occurred on the night of July 29-30, 1916, at the terminal yard of the

Lehigh Valley Railroad Company in New York Harbor, known as the Black Tom Terminal, and is known as the Black Tom Case. The second relates to the destruction of the Kingsland plant of the Agency of Canadian Car and Foundry Company, Limited, at Kingsland, New Jersey, and is known as the Kingsland Case. This fire started in the late afternoon of January 11, 1917. The two cases have from the beginning been carried along together, both in the taking of the evidence and in the arguments. It will be convenient to deal with them in one opinion.

The questions involved are questions of fact. Germany and the United States, now friendly nations, have entered into an agreement under which Germany accepts liability for such damage during neutrality to citizens of the United States, if the damage resulted from acts of her authorized agents.

The Commission has no difficulty with the question of authority in these cases. The persons alleged to be responsible for causing these two fires to be set—either by participating in the act themselves or by employing sub-agents of their own—were in such relation to the German authorities, and some of them in such special relation to Nadolny

285 and Marguerre, who were in charge of the Political Section of the German General Staff, or to Hinsch, that Germany must be held responsible if they, or some of them, did cause the fires to be set. The Commission does not need direct proof, but on the evidence as submitted we could hold Germany responsible if, but only if, we are reasonably convinced that the fires occurred in some way through the acts of certain German agents.

We have no doubt that authority was so given by Marguerre in February, 1916. Marguerre himself so testifies. Nadolny had on January 26, 1915, sent a cable authorizing such sabotage. Nadolny in his evidence gives the impression that the policy was abandoned shortly after his cable. Marguerre testifies that the authority given by him in 1916 was not to be exercised during neutrality, but only in case the United States entered into the war. We do not believe his evidence with respect to this alleged limitation of the authority, though.

It is well recognized that Governments who have agreed to arbitrate are under obligation in entire good faith to try

to ascertain the real truth. Nadolny may have suppressed evidence as to his knowledge of the instructions given by Marguerre, and we think, though of course we may be mistaken, that Marguerre did not tell the truth. Nadolny's examination was confined wholly to his cable, and the Marguerre instructions were not at that time a feature of the case. We cannot be sure of what Nadolny knew, and would not be willing without further evidence to accuse him, but we have felt it necessary to mention the possibility. It is also apparent that von Strempel of the German Legation in Chile, in another connection failed to communicate to the Commission statements made to him by Herrmann, which tended strongly to cast doubt upon an affidavit of 286 Herrmann which von Strempel was forwarding to the Commission, though it should be added that we can easily understand that von Strempel did not believe these boasting tales of Herrmann, who even then, apparently, did not admit complicity of himself or Hinsch in Black Tom or Kingsland. Marguerre's personality does not seem important, but Nadolny and von Strempel are diplomatic representatives of Germany. Von Strempel was a young man, unfamiliar with the case, and probably did not fully realize his obligation as a diplomatic representative to the Commission and to his own Government.

In speaking as we have of Nadolny, Marguerre, and von Strempel we have not the least intention to raise any doubt as to the entire good faith of the present German Government in its management and presentation of these cases, nor of the Agent who has represented Germany as counsel. And in order that this last statement may not be construed as merely conventional courtesy, we state specifically that we have no such doubts. We believe that the present German Government was entirely prepared to bring out the truth and to take the consequences, whatever they might be.

It is unnecessary to go further and determine whether such sabotage was the general policy of the then German Government. The Foreign Office did specifically authorize the cable, already referred to, which Nadolny sent to the Embassy in Washington. We are inclined to think that the diplomatic representatives in the United States were not in accord with the idea and did nothing in the way of exer-

cising this particular authority. There was an admitted policy to destroy and damage property of the nations at war with Germany at this time and later, and it is obvious that such acts if committed in or from the United States were serious violations of neutrality, that agents engaged

therein were not likely to discriminate very carefully between acts on United States territory and

acts outside the United States, or between property belonging to Germany's enemies and property not yet delivered, but intended for Germany's enemies. But in general we are all inclined to the opinion that Germany's diplomatic representatives in the United States were averse to attacks on American property, that their opposition to such a policy, so far as they, possibly, knew or suspected that it was being carried out, became stronger as the relations between the United States and Germany became more and more acute. We see no evidence in these cases, however, that such authority as the Political Section of the General Staff gave was ever modified. And up to the entry of the United States into the war there were in the United States certain German agents who were, or at least pretended to be, active in sabotage work. But we are also convinced that the number of agents so engaged was always small in proportion to the field to be covered, that they were never organized effectively, and that their numbers and effectiveness continually decreased, partly because of difficulty of communicating with Germany and other difficulties inherent in their situation, and even more because of efficient counter-work by the United States Secret Service and prosecuting officers. We are convinced also that their pretensions in such reports as they may have made and in their talk with each other were for the most part gross exaggerations of their actual accomplishments.

With this background, which renders inferences against Germany easier than they would otherwise be, we approach the evidence as to the German agents and their alleged tools. We found ourselves absolutely in agreement as to this background upon our first consultation after the close of the arguments and before we had considered at all

the responsibility of any of the German agents.

These cases have been argued twice, the second argument having been necessitated by the production of

new evidence. The second argument, has occupied the most of ten days, and it has not been too long in view of the enormous record of evidence and the details which the counsel were obliged to cover. We have no intention of covering all these details in our opinion, but it seems desirable that we should indicate as briefly as possible our views as to some of the more prominent features of the evidence, although we will begin by stating our final conclusions, viz.:

In the Kingsland Case we find upon the evidence that the fire was not caused by any German agent.

In the Black Tom case we are not convinced that the fire was not attributable to Hinsch and Kristoff; though we are convinced that it was not attributable to Witzke or Jahnke. But we are quite a long way from being convinced that the fire was caused by any German agent.

We therefore decide both cases in favor of Germany.

In the Kingsland Case the persons possibly involved as participants are Witzke, Jahnke, Hinsch, Hermann, Wozniak, Rodriguez, and Thorne. The evidence relating to Witzke and Jahnke is mainly in the shape of alleged admissions by Witzke and is intermingled with his alleged admissions in connection with the Black Tom Case. This evidence makes no impression whatever upon us with respect to the Kingsland Case, but the fact that it does refer to the Kingsland fire as well as to the Black Tom fire tends to weaken the effect of the alleged admissions as to the Black Tom Case. On the evidence we are satisfied that Witzke and Jahnke were not in the east at the time of the Kingsland fire, and eliminate them from further consideration in connection with Kingsland.

The Kingsland fire of January 11, 1917, started in
289 a building devoted to the cleaning of shells. It started at the bench of a workman named Wozniak. The case against Germany in substance depends upon whether Wozniak started this fire, under Hermann's direction.

Until Hermann, who was undoubtedly a German agent and had previously testified that he had nothing whatever to do with the Kingsland fire, changed his attitude and testified that he employed Wozniak to start the fire there was nothing from which we could reasonably infer either that Wozniak was a German agent or that he caused the fire.

Hilken, another German agent, since Hermann changed his testimony, has testified that Hermann told him long ago the same story that Hermann now tells. Hinsch, the man whom Hermann connects with himself in the story, has denied it. His denial contains plausible details, but we could not rely on it if we felt that Hermann was not telling the truth, for though we have no evidence that Hinsch is a liar, there is a strong presumption that he might be under circumstances which pointed to his guilt.

Hilken and Hermann are both liars, not presumptive but proven. No one could in the light of all their evidence believe anything either says unless something other than his own assertion confirmed his statements. Hilken's first long and detailed statement in these cases contained nothing of what he now says in respect to Kingsland. He had previously testified before the Alien Property Custodian and had lied continuously. In his first statement for the Commission he professes his willingness to tell the entire truth. If he did, there can be no truth either in his or Hermann's present story. Later he admits that he did not earlier tell the whole truth, and explains his failure to do so by his unwillingness to implicate others. But after this first testimony to the Commission he was sent by counsel for the claimants to Chile to persuade Hermann to testify, in which mission he failed. On his return he made an affidavit
290 covering his conversations in Chile with Herrmann.

In this affidavit it is evident that he had no further desire to shield Herrmann, if he ever really had such a desire. He tells of various things which Herrmann said to him which he knew were not true, and pretends to tell what he knows to the contrary. But he says nothing about his knowledge of the story Herrmann now tells about Kingsland. If Hilken had not mentioned Kingsland in this affidavit, his present story would be more credible. But he says that he asked Herrmann about Kingsland and that Herrmann in Chile denied all knowledge of it. Instead of reporting that Herrmann had previously told him all about it, as he now testifies, he adds to Herrmann's denial merely the statement that Herrmann had previously told him that he and one Gerdt once rode over to look at Kingsland after the fire.

Herrmann's present story has in its favor whatever presumption arises, even after repeated denials, from the fact that he is confessing his own participation in a crime of serious importance. We know also that some of the things he previously denied are true. We know, or at least believe, that he was authorized in Berlin by Marguerre to commit sabotage during neutrality, and we know that he was supplied by Marguerre with inflammatory devices in the form of pencils, containing glass tubes. Appropriately manipulated the chemicals in the tubes would mix after an interval of from 15 to 30 minutes and cause a flame. But his testimony now with respect to Kingsland and Black Tom is not at all that of a witness who for reasons of conscience desires to make a clean breast. Whether he now means to tell the truth or means to lie, he is testifying solely because of the fact that he has lost his position in Chile, that the German Government has not taken care of him, and that by testifying he has secured the chance to get back to the United States with a guaranty of immunity. We do not imply or think that anything improper was done to induce him to testify, merely that it is sufficiently obvious that Herrmann would not have turned his coat if the German Government or the German Legation in Chile had offered him appropriate inducements, and that having turned his coat because of advantage to himself he is pretty sure to be in a mental attitude in which hostility to Germany and desire to make good with the claimants play a substantial part. And there is nothing about Herrmann of which we feel so sure as that he will lie if he thinks lying worth while from his own point of view.

His story is, in brief, that he planned in accordance with instructions from Nadolny and Marguerre to commit sabotage in Kingsland, that he applied to Hinsch to furnish a man, that Hinsch said he would and brought Wozniak to him, that he learned from Wozniak, not from Hinsch, that Wozniak was working in the Kingsland plant and that Wozniak thought he could accomplish something, that after one or two interviews he got distrustful of Wozniak, who seemed to him like a "nut", told Hinsch so and asked him for another man. Hinsch then brought Rodriguez to him. Herrmann then brought Wozniak and Rodriguez together

and asked Wozniak if he could get Rodriguez a job at Kingsland. Wozniak said he could as he had a pull with the employment bureau. Still later he met the two and learned that Rodriguez had the job. He then gave them each some of the inflammatory pencils, told them how to fix them up, and instructed them to put one in a coat pocket somewhere, standing up straight. The chemicals would do the rest. He paid them not over \$40 a week—he did not seem very sure how much—during this short period. After the fire he saw Rodriguez once, but he never saw Wozniak again. He asked no questions whatever of Rodriguez, but paid him \$500, gave him a fictitious address and never saw him again.

Herrmann's story is somewhat confirmed by the fact that probably Rodriguez was employed about the time
 292 Herrman says, shortly before the fire, and by the fact that Wozniak has peculiarities which might lead Herrmann to characterize him as a "nut", though the word "crank" would really be more accurate. On the other hand, Herrmann before he had told this Wozniak story had seen enough of the early arguments, briefs, and affidavits in the case to know of Wozniak, to suspect him of being a bit queer, to know that the fire started at his bench, to know that Rodriguez was supposed to have usually worked next to Wozniak. But there is nothing to show that Herrmann could have learned beforehand that Rodriguez had been employed only a short time, though this is not impossible. Herrmann's attention would before his testimony have been focussed somewhat on Rodriguez because in the early stages of the case Herrmann himself was suspected of having been the Rodriguez who worked at the plant. This suspicion was probably due to the fact that Herrmann used the name Rodriguez when he was in Mexico before going to Chile. It is argued that the fact that he used this name is a confirmation of his present story, that the name came into his head because he had employed Rodriguez. But it seems to us unlikely that Herrmann would take in Mexico the name of someone whom he had employed to set the Kingsland plant on fire, and Rodriguez is a common enough name in Spanish countries. In fact there were 20 different men named Rodriguez on the payroll at Kingsland at different times.

Herrmann's story, as stated above, appears at its best, but there are internal difficulties in the story itself. A man named Thorne plays an important part in the theory relating to Wozniak and Rodriguez. Thorne was in the employment office of the Kingsland plant, and the theory is that he was well known to Hinsch, that Hinsch had Wozniak and Rodriguez at his command, and that Rodriguez must have obtained his employment through Thorne. There is
293 a good deal of evidence that throws suspicion of some sort on Thorne, so far as sympathy with Germany, general lack of morals and willingness to do shady things are concerned, but nothing convincing to show Thorne's acquaintance with Hinsch. Hinsch denies acquaintance with Thorne, but it was certainly possible that he did know him. Herrmann says he did not know Thorne, though there is some evidence that he did. Wozniak had been in the plant six months at least, and so had been there several months when Thorne was employed as an assistant in the employment office. If Hinsch had had Wozniak at his command and in the plant, there was no very good reason why Herrmann should have taken part in the scheme to have Wozniak do the work. If these other allegations are true, Herrmann could not have asked Wozniak where he was working, as he says he did the first time he saw him. He would not have asked Wozniak, as he says he did, if Wozniak could get Rodriguez a job. And Hinsch would not have assented without any discussion, as Herrmann says he did, to Herrmann's estimate of Wozniak as unsuitable for his purpose. Herrmann's story of his conversations with Wozniak and Rodriguez is strangely lacking in the details which would be inevitable in such conversations, if he ever employed these men for the purpose and in the way he says he did. He was pressed by German counsel for any further details of these conversations, but we get no talk as to how or where they could set the fire; or whether a fire was likely to be effective if set in Wozniak's building, no discussion of particulars with either of them except the instructions as to the pencils which were quite explicit. This lack of detail might have been explained by the fact of which we are convinced that Wozniak's knowledge of either English or German was extremely limited. But Herrmann says that the conversa-

294 tions were in English and that Wozniak spoke English freely though with an accent, a statement which in view of our judgment as to Wozniak's ability to speak English at that time arouses further distrust.

And the job, according to Herrmann's story, seems to have been turned over by Herrmann to Rodriguez after he came on the scene. Rodriguez, not Wozniak, was the man relied on. Rodriguez was the only one of the two who turned up after the fire, and Herrmann explicitly says that he asked no questions at all but paid him \$500 and never saw him again. And yet Wozniak set the fire if anyone did. And Rodriguez, the only man Herrmann saw after the fire, the only man he paid after the fire, was not at the Kingsland plant at all on the day of the fire.

If there is one thing sure about Wozniak, it is that Wozniak was keen for money. That he would not have come after his money himself is inconceivable to us with our knowledge of Wozniak's previous and contemporary life and habits. We have a great deal of evidence about Wozniak's earnings and his use of his money, but we get no indication whatever that he actually got any of the money that Herrmann said he paid.

Again, Herrmann's description of Wozniak corresponds exactly with a poor photograph of him which, we think, Herrmann had seen before he told his story, and differs in two quite important particulars from the real Wozniak. Herrmann's story of Wozniak's presence later in Mexico also arouses our suspicion, partly because we are quite certain that Wozniak never was in Mexico, partly because it is improbable that, if he had turned up in Mexico, Herrmann would not have seen him, and partly because, whether Herrmann saw him or not, his talk there in Mexico with Hinsch about Wozniak's presence in Mexico could not possibly have been so casual and inconsequential as Herrmann states that it was.

295 The discrepancies and improbabilities of Herrmann's story tend to strengthen our very strong impression from Wozniak's acts and statements at the time of the fire and shortly thereafter and from the circumstances of the fire that Wozniak was not guilty. In the same way our impression of Wozniak, derived from care-

ful study of these acts and statements and circumstances, tends to increase our doubt of Herrmann's sincerity in his latest evidence.

Our impression that Wozniak is innocent is not due to his own protestations of innocence. Any man, however guilty, might claim innocence, and Wozniak has shown in connection with matters having nothing to do with the fire that he would not let a little thing like truth stand in his way.

Our impression is derived first from the circumstances connected with the fire itself. Gasoline was used in cleaning the shells and the fire spread quickly, so that there was great excitement and confusion. The interval between the time when the first small flame was seen and the time when everyone present ran for his life was very short. The pan of gasoline close to Wozniak's machine (as in the case of all the 48 machines) would account for this, but in addition one workman says that one of the men threw a pail of water on the bench where the flame first appeared. (The fire buckets in the building contained water instead of sand.) Wozniak says he made an effort to stifle the fire and there is evidence of another workman that he saw Wozniak make some such effort. If we were called upon to guess what caused the fire from the evidence of the circumstances, we should without hesitation turn to the machine which held the shell which Wozniak was cleaning.

There is strongly persuasive evidence that these 296 machines required constant watching, that when out of order they squeaked and threw out sparks, and that fires, quickly extinguished, had previously occurred from this source, and there is some evidence from a workman close by of squeaking and of sparks from Wozniak's machine just at the time of the starting of the fire. Wozniak himself does not mention this in his contemporaneous statements, though he later mentioned it merely as a possible explanation. In fact he says that his machine was running well that day, though it had sometimes run very hot. To Wozniak the fire seemed to originate in the rapidly revolving shellcase itself and to follow the rag wound around a stick with which he was drying the shellcase when he withdrew the rag. It is interesting to find that his own statement is the only one which bears any resemblance to what would have happened if he had used one of

the inflammatory pencils with which Herrmann says he supplied him.

Wozniak, as we have said, is not a "nut", but a crank. He is in a way smart, though naïve, and thinks he is smarter than he really is. How could such a man, or any man who had for some time been studying and planning to set fire to the plant, start the fire at his own bench, where attention would necessarily be directed to him, to say nothing of the fact that the particular place and the particular building would not, to persons planning beforehand to set a fire, seem to be places where a fire once started would be particularly likely to be effective, as this fire certainly was? And that a smart crank like Wozniak should after starting the fire with an inflammatory pencil describe its beginning in a way which had even a slight resemblance to a pencil fire is equally incomprehensible. Also incomprehensible is the fact that a man like Wozniak should not have had ready, when he was examined a day or two later, some plausible explanation of the cause of the fire, but he certainly had no explanation at hand, though later he
297 made various suggestions and possibilities.

Although, as we have said, Wozniak's description of the starting of the fire bears some resemblance to what might have happened if a pencil had been used, the resemblance is not close enough to make us suspect that a pencil was actually used. But more important is the fact that Wozniak, if he used a pencil, must have abandoned completely Herrmann's instructions as to how to use the pencils. The pencil was intended to enable an incendiary to start the fire at a time and place when and where he could not be connected with it. The pencil was devised to operate only after the lapse of 15 to 30 minutes. It was not at all adapted to starting a fire at the place where the incendiary intended to remain. Besides, the pencil needed to stand upright, and the shell from which Wozniak said the fire seemed to start was in a horizontal position, revolving in Wozniak's machine in the process of cleaning and drying. The shells seem to have passed through the various phases of this process at the rate of about three every two minutes, an average of about 40 seconds each. Even if we assume that Wozniak had found some way—Herrman evidently had not—to make the pencil work faster, we cannot adapt

the pencil idea to the actual process, and cannot imagine that anyone planning the fire in advance would have considered it possible to use the pencil there under the eyes of the other workmen close by. Rodriguez and Wozniak are supposed to be working together on this plot. They are instructed by Herrmann and provided with pencils. They talk and plan together—supposedly—how to do the job. There are toilets available; there are workmen's coats somewhere; there are even coats hanging about that particular room; there are cases of clean rags; there are dirty, gasoline-soaked rags; there must be other opportunities of which we have no evidence. And yet we are asked to believe that Wozniak started the fire with a pencil in a dry shell-case, which was revolving in his own machine at the end of this process which as a whole lasted about 40 seconds. And Rodriguez, the man really relied upon, was not there that day.

The evidence as to Wozniak's conduct at the moment, his examinations, his conduct during the weeks immediately succeeding, his relations with the representatives of Russia, his life before the fire and afterwards almost to the present, his disappearance, his reappearance and his subsequent testimony, his alleged appearance in Mexico among the German agents there, occupy many pages of the record and could be discussed here ad infinitum, as they have properly been discussed almost ad infinitum by counsel in their briefs and arguments. Suffice it to say that we do not believe that he was in Mexico; that the letters he wrote the Russian Embassy before the fire are in our judgment not a blind, but exactly such letters as Wozniak would compose, and indicate to us that he really, as he says, was at heart Russian, intended to go to Russia, and was shocked at the carelessness and, as he thought, corruption of the inspectors at this plant which was assembling shells for Russia; that without relying at all on his honesty of statement he nevertheless seems to us to act and talk like a man who is really innocent in respect to this fire. It is of some significance that through the Russian Consulate he sent \$90 to Russia the day after the fire—not the act of a man who the previous day had destroyed this supply plant for Russian munitions, and whose money or part of it came as pay for such destruction. The picture

of him which one gets from reading the reports of the four detectives who watched him night and day for about four weeks following the fire is a picture of a man frugal in the extreme, living at the Russian Immigrants' Home, buying and cooking his own meals, milk, bread, occasionally a little fish or meat or fruit, reading Russian papers or

299 books a good deal, quiet, with no luxuries or dissipation, almost no acquaintances, no suspicious actions, no suspicious meetings, no indication whatever that he had anything to do with his supposed co-conspirator Rodriguez or anybody connected with Germany.

And so, despite Herrmann's confession, the evidence in the Kingsland Case has convinced us that Wozniak did not set the Kingsland fire, and that Germany cannot be held responsible for it.

In connection with Black Tom we shall not mention some possibilities which have practically been abandoned by the claimants, or some agents who have not been abandoned in argument, like Sauerbeck for instance. We have not ignored them, but we do not think them worth talking about in connection with Black Tom.

The picture of the fire itself, which we have in our minds as the result of our study of the voluminous, detailed, and often contradictory evidence, shows a large railroad terminal on the Black Tom promontory which stretches out from the Jersey side into New York harbor not far from Ellis Island. This terminal is full of railroad cars, many of them loaded with ammunition. At one point is a dock to which on that night were tied up a number of barges, some of which, like the cars, were loaded with shells and TNT. The yard was guarded and watched, but access to it by intentional incendiaries, particularly from the New York harbor, was certainly not impossible, perhaps not difficult. The fire started in the middle of a clear, fairly calm night at about 12:45 a. m., in the form of a small blaze which was discovered by the watchmen, breaking out around the door of a wooden boxcar which probably contained explosive shells filled with smokeless powder. There is some claim of more than one fire, but we do not believe there was. The fire spread, the explosions occurred, and the damage was great. It is somewhat difficult to understand how in-

cendiaries under the circumstances as we picture
 300 them could have secured access to this car, broken
 into it, and set the fire without being seen or heard.
 Nor does it seem likely that careful planning beforehand
 would have resulted in setting fire at this part of the yard,
 in one car, or in this particular car. There were other
 points of approach and other methods which in advance
 would have seemed more likely to produce results. But
 there is nothing in the circumstances which excludes incendi-
 arism. The fact that smokeless powder, properly pre-
 pared, is conceded by experts not to be subject to spon-
 taneous combustion is a strong argument in favor of incendi-
 arism. But the Lehigh Valley Railroad Company in
 its defense to the suits brought against it for negligence
 relied largely upon spontaneous combustion, and we get
 the impression that their counsel had real faith in this
 particular defense. And yet they then had in their pos-
 session a good deal of the evidence which we now have
 which tends to implicate Kristoff.

So far as we can see, the circumstances of the fire leave
 the question of its cause open. It may have been some fault
 in the preparation of the powder in the shells in this car;
 it may have come from some other cause connected with
 explosives, for though we know of no cause which would
 naturally be suggested by the supposed contents of this
 car we are suspicious of explosives in general; it may have
 come from some other accident of which no evidence ap-
 pears; of course the fire may have been of incendiary
 origin, and in this connection it may be noted that all
 incendiaries are not German agents. We can be sure,
 however, that any German agent seeking for a chance to
 destroy munitions would have looked upon Black Tom with
 the keenest interest.

Leaving out of account some alleged suspects who are
 not worth attention, there are two theories which attribute
 the fire to German agents. One of these theories centers
 about Witzke and Jahnke; the other around Kristoff.

Both theories have been urged upon us strongly.
 301 The two theories may be combined into one theory,
 viz., that all three took part. The two theories never
 have been, in fact, so definitely separated in the arguments
 or in the evidence as our statement above would imply. But

we insist upon the separation. We are sure that if Witzke and Jahnke were concerned in Black Tom no person like Kristoff would have been needed or used. He would have been not only a superfluity but a nuisance, even a menace, Witzke and Jahnke strike us as capable, capable where German interests were involved of desperate measures, not in the least in need of assistance from an individual like Kristoff. We do not believe that they would even have trusted Kristoff to row a boat, much less to take a real part in any Black Tom expedition.

Witzke took part in an expedition from Mexico into Arizona after the United States entered the war. He was betrayed by his companion, Altendorf, who was in the employ of the United States as well as of the Germans, convicted as a spy by court-martial, sentenced to death. He was a spy and the sentence was appropriate, but it was later commuted to life imprisonment and still later he was released. The evidence of participation in Black Tom by Witzke and Jahnke consists chiefly of admissions alleged to have been made by Witzke to his companion Altendorf before he was captured, with some confirmation by another companion, Gleaves, and by others including one or two guards who talked to him during his confinement. The alleged admissions cover not only Black Tom but also Kingsland. Witzke has consistently denied these admissions during his trial and confinement and since his release. As we have so definite an impression about Kingsland, the inclusion of Kingsland in his supposed admissions would of itself make it almost impossible for us to accept the admission so far as concerns Black Tom. Altendorf, the chief witness as to admissions by Witzke, is also the chief liar who has appeared in the cases before us, a chief among competitors of no mean qualifications. The details, so far as any details appear in the supposed admissions, 302 have little relation to probability, even if we assume that Witzke and Jahnke were actually involved in Black Tom. It is perhaps unnecessary to add anything to the above, but we are also satisfied from the evidence that Witzke and Jahnke were not in the east at the time of the Black Tom fire.

The only effect which all the evidence and argument with respect to Witzke and Jahnke has had upon us is to add

considerably to the doubts which we would in any event have had with respect to the evidence implicating Kristoff. Kristoff never set the Black Tom fire alone. Witzke and Jahnke being eliminated, there are no persons in the evidence who seem at all likely to have been his companions, a fact which is nowhere near conclusive but which adds to our doubts. And the actual evidence against Kristoff is so nearly of the same nature as these categorical admissions attributed to Witzke that when we find ourselves satisfied that Witzke's alleged admissions mean nothing to us our doubts as to analogous admissions and other analogous testimony are strengthened.

Suspicion was focussed very early on Kristoff in connection with Black Tom. He lived at the time at Bayonne, N. J., with an aunt, Mrs. Rushnak, whose daughter was Mrs. Chapman at whose house Kristoff had sometimes roomed earlier. A day or two after Black Tom Mrs. Chapman reported to Lieutenant Rigney, a police officer of Bayonne whom she knew well, that Kristoff had reached home on the night of the fire at about four o'clock in the morning, that he was greatly excited, and that her mother heard him walking in his room and heard him say "What I do! What I do!" and that they suspected him of being responsible for the Black Tom fire. We feel sure that this is all they reported. Both Rigney and Charlock, a detective who was assigned to the case and followed it assiduously,

say so, and we take pleasure in adding that we believe them. We also believe that Mrs. Chapman then reported to Rigney, and we believe that the two women really suspected Kristoff. Later Mrs. Chapman said that she at some earlier time saw something like a blueprint or blueprints in Kristoff's room, when he was in her house, and that in his absence she once read a letter, which he had written but had not yet sent, to a man named Grandson or Grandor, demanding a large sum of money. We do not believe that Kristoff had a blueprint, certainly not for his own use, for we do not believe that he could use one. His own story about Graentsor makes it possible that he wrote a letter such as Mrs. Chapman described, but we doubt any story told by her after Kristoff's own story to the police came to her knowledge. The value of any evidence

by Mrs. Rushnak and Mrs. Chapman, except as to Kristoff's late arrival, his excitement, and the "What I do!", will appear from their later statements. Mrs. Chapman said later that Kristoff was in the habit of going away on trips and that wherever he went there was always an explosion, and they both said later, some ten years or more later, that Kristoff told Mrs. Rushnak the morning after the fire that he had set the fire. We feel quite sure that they really suspected Kristoff in spite of the fact that Mrs. Chapman's husband later told Green in Charlock's presence that his wife had reported the matter to Rigney merely because she was in a family way and thought she might get some money from the Lehigh Valley Railroad. As to the reasonableness of their then suspicion, we can judge only by our own guess from the late arrival, the excitement, and the "What I do". Mrs. Chapman's and Mrs. Rushnak's judgments on a given state of facts are worthless. At this stage of the evidence we can only add that Kristoff was a man who probably returned late at night at other times, that excitement whether for a good reason or for a trivial reason was probably not an unusual event for Kristoff, and that if he was excited it is

304 unlikely that he expressed his excitement in the English language. The "What I do! What I do!" is probably Mrs. Rushnak's translation of what she heard Kristoff say. But at the same time it is hardly likely that it is not a substantially correct translation.

The name Grantnor is of great significance in this case. The connection between Kristoff and Hinsch, who was a German agent and who is alleged to have used Kristoff as his tool in Black Tom, depends substantially on whether Hinsch used the name Grantnor as an alias. One Frank Oscar Granson seems to have been actually an individual who later was a witness in the Rintelen case, whom Hinsch is supposed to have known. The theory pressed upon us is that Hinsch in seeking aliases was accustomed to adopt names familiar to him and so adopted Granson. Why he should have changed it to Grantnor, or Graentnor, as it is more commonly spelled in the evidence, and why he should have changed Frank to Francis, is not explained. The actual spelling is of importance, for Grantnor is an English

name and Graentnor is not, and Grantnor and Graentnor are pronounced differently. The significance of the spelling applies particularly to Herrmann's evidence, for Herrmann was obviously in doubt as to the spelling. Herrmann to corroborate his testimony that Hinsch used the name Grantnor says that he laughed at Hinsch for using the name because it was an English name and Hinsch, as was obvious to anyone, was a German. There is no sense in this testimony of Herrmann if the name was spelled Graentnor or if Herrmann thought it might have been so spelled. Herrmann, though born in the United States, was a thorough German—knew the German language thoroughly. He could not have called Graentnor an English name, and he could not have imagined that a name, which he had heard often pronounced and was accustomed himself to pronounce Grantnor, might possibly be spelled Graent-

305 nor.

The name, whatever it is, appeared first in Kristoff's story to the police on his arrest in 1916. We have a verbatim report of one of these examinations. As Kristoff first used the name here, it is spelled Graentsor. In the other places in this report it appears as Graentor and many times. How it was then pronounced we do not know. In the police examination of Kristoff later in 1921, the name appears as Gramshaw, indicating that Kristoff when using the name himself always insisted on the "s". Kristoff does not seem to have raised any question in his first police examination as to the dropping of the "s" by his examiners, or as to the pronunciation, whatever it may have been. But Kristoff was not the kind of a man to worry about such changes so long as he understood what man they were asking him about. And Kristoff was not the kind of man to invent the name, whatever the name was. He must have known some man who called himself either Grantsor, Grantnor, Graentnor, Grandor, or perhaps Gramshaw.

Rigney and Charlock were of the Bayonne police force. As Black Tom was in the jurisdiction of the Jersey City police, Rigney reported Mrs. Chapman's story to them. At their request Rigney arrested Kristoff about 30 days after the fire and turned him over to the Jersey City police. The

case was in charge of one Green, now dead, but Charlock kept in close touch with it. Kristoff was committed as a suspicious person on a disorderly-conduct charge, held for about 25 days, and then discharged. During this time the police became convinced that he ought to be examined for insanity, and he was so examined by Dr. King of the prison where he was confined. King, who seems to have had substantial experience in this line, reported that his intelligence was of low order, that his talk was rambling and he could not keep his mind on any given line, but that he was not in his opinion dangerous. King made up his mind that Kristoff had nothing to do with Black Tom.

306 Rigney and Charlock came definitely to the same conclusion. We do not know what Green thought, but the fact that Kristoff was discharged makes it certain that at the least the Jersey City police had not sufficient evidence to make the charge against him, and it is significant also that they did not keep Kristoff under surveillance or do anything else towards pushing the matter further. Their judgment is important, for they certainly had a good deal of the evidence now so strongly relied upon.

One of the main points now relied upon is the breaking-down of Kristoff's alibi. But that alibi broke down at once. Kristoff on being questioned by the police said he was at the time of the fire at the house of his aunt at Yonkers. Green apparently went to his aunt's house and was told he had not been there that night. It does not definitely appear that Green made further investigation on this point.

But we can have no doubt that the police, before letting go of Kristoff, not only cross-examined him thoroughly about his broken-down alibi but that they catechized Kristoff time and again about this and everything else suspicious or doubtful in his statements or his actions so far as they could learn of them; his returning late, why he was excited, why he said "What I do! What I do!", his Grant-sor story—everything they could possibly think of. Rigney said he did his best before turning him over to the Jersey City police. Charlock said he examined him many times, the last time when he was discharged. Green and others of the Jersey police must have done the same thing. Green particularly could not have dropped the alibi after he had

Broken it down, or dropped Kristoff until he had tried to get some explanation. They must have got everything they could. We do not know whether Green was satisfied of Kristoff's innocence, but Rigney and Charlock were.

We cannot help giving weight to the fact that they
 307 discharged Kristoff when it would have been the great glory of any of these men to find and convict the culprit in this great disaster. And we might even suggest that the gentlemen of the press doubtless knew everything that the police knew, that many people who knew Kristoff knew that he was arrested and why, that reporters were questioning and hunting, and that any well-intentioned person who knew anything suspicious about Kristoff would have been likely to bring it to the attention of reporters or police authorities. The Black Tom disaster and Kristoff were certainly in the limelight.

The most extraordinary part of Kristoff's story to the police was with respect to the man with the kaleidoscopic name whom we will for convenience call Grantnor. According to Kristoff, Grantnor met him in the Pennsylvania station in New York, asked him the time, got to talking, and then and there employed him to take with him a long trip, covering many cities, including cities as far west as Chicago, Kansas City, and St. Louis, staying from one to three days in these various places. He lent Grantnor \$275, for which Grantnor was to pay him \$5,000. He received from Grantnor only a few cents at a time, but at St. Louis Grantnor gave him a dollar to go to the theatre, and when Kristoff came back Grantnor was gone, and Kristoff never saw him again except once when he met him by chance on the street in New York, when Grantnor agreed to get him a job and being in a hurry made an appointment for that night at the McAlpin Hotel, where, strangely enough, he was not to be found when Kristoff went there to get the job. Kristoff knew nothing whatever about what Grantnor did on these trips, except that Grantnor told him he was trying to get contracts. Grantnor had two suitcases which Kristoff said contained plans and blueprints. Kristoff's sole duties were to carry the suitcases and to watch them when Grantnor was not in his room. Kristoff did not go out with Grantnor in any of these cities, except

308 for a casual ride or two, and did not see any of the people with whom Grantnor talked. He has asked Grantnor for his regular address but never got it. When first employed he was supposed to be paid \$20 per week, but he never got even that.

The story is suspicious enough in all conscience. If Grantnor can be shown to be Hinsch, we can easily get a good deal of truth out of the story and add a good deal of detail. Hinsch himself testifies that he never went further west than Gettysburg.

But the first thing the story shows us is Kristoff himself. There is no danger that the story represents real facts, but it does represent Kristoff. Whether Kristoff was trying to tell the truth and couldn't, or whether he was trying to make up a good-looking lie and couldn't, we get a vivid picture of a simpleton, almost a plain fool, and we know that King is complimenting him when he speaks of him as a man of a low order of intellect.

That is in substance all the direct testimony we have at that time from Kristoff himself. The police had it and did their best with it. Charlock was particularly interested in Grantnor and asked Kristoff to try to find him and let Charlock know. Kristoff is now dead.

In the course of the later investigations of Kristoff we have alleged admissions by him, which are seriously important testimony, whatever doubts we may have regarding them.

These admissions are reported by a detective named Kassman, one of the men of the Burns Detective Agency, which was employed by the Lehigh Valley Railroad Company to shadow Kristoff. From October or November, 1916, to April, 1917, Kassman devoted himself to Kristoff, working in the same factory, getting intimate with him, eating with him, convincing Kristoff that Kassman
309 was an anarchist and so acquiring his confidence, talking to Kristoff about the Black Tom fire and about the possibility of damaging other munition plants, which Kassman professed to Kristoff to be very anxious to do. The evidence shows that Kassman, whether a compatriot or not, could speak some language which Kristoff spoke naturally, and spoke little English himself.

We judge therefore that their talk was not in English and that Kassman's reports which in the evidence are in English must be translations of what Kassman reported in the language which he used in talking with Kristoff.

We have not all of Kassman's reports. Why we do not know. We get the impression that the reports we have, which run along from the beginning of his employment to the end with varying intervals between the reports, were selected and put together in the shape submitted to us; not selected for the purpose of submission to us but for some other purpose. Very likely they were so selected because they seemed to the person making the selection to be the only important reports in a long series. Whatever the explanation, the reports as submitted to us omit much that seems important to us. We cannot accept at face value admissions appearing in reports from a detective when other reports from the same detective are lacking, which may conceivably contain denials, or explanations, or side-lights, or statements of fact which are inconsistent with other circumstances which we know or with the alleged admissions.

And Kassman, entirely unconsciously, discredits every admission by Kristoff which appears in his reports. In his affidavit to the Commission stating that the attached are some of his reports and that they are true, Kassman undertakes to state, again in English, what Kristoff admitted to him, and this statement not only changes the language of the admissions in the reports but also changes the substance very materially. Where Kristoff in the alleged admissions speaks of "steamboats" at Black Tom upon which he and his companions set fires, Kassman in his affidavit speaks of "barges". There were no "steamboats" at Black Tom, but there were "barges". Again, the admissions in the reports speak only of setting fires on "steamboats", and we see no reason to believe that any fires were set on any boats, whether steamboats or barges. Kassman in his affidavit says that Kristoff said not only that a fire was set on a barge, but also that one man set a fire among the cars. The affidavit is made about 10 years later than the reports, but the difference is not forgetfulness. It is the conscious effort of Kassman to say what the immediate necessity seems to him to call

for. If the admissions do not fit, he is prepared to make them fit and does his best.

Kassman's reports were in the hands of the Lehigh Valley Railroad Company when the cases against the company, arising out of Black Tom, were tried. So far as we can ascertain, the evidence was not used. We can see reasons for this from the point of view of successful defense, and we are not inclined to attach great weight to this point or to the fact that they urged spontaneous combustion so persistently. The only weight we would give to the last point arises from the impression of sincerity which the language used by the railroad's counsel makes on us. It is somewhat singular that it makes this impression, for we are all used to pleadings and openings and arguments, and in most cases would not get any impression one way or the other from them. But of course there is no estoppel here, and the opinions of counsel in other cases, however sincere, do not establish facts for the cases before us.

Nor were these reports made the basis for any criminal action against Kristoff. This would be of some importance if they had been in the possession of the police, but we can understand that the railroad company or the present claimants would not be particularly interested in punishing Kristoff but might be hoping to supplement whatever evidence Kassman supplied so as to reach whatever influences were behind him.

The language of the confessions is not in itself persuasive of their truth. They sound as do the admissions alleged to have been made in Mexico, more like a reproduction of gossip current in the circles of the man who used the language—whether that man was really Kristoff or whether the language comes from Kassman only and not from Kristoff—than they do like statements of fact made by or quoted from a man who is telling what he himself did. More important still, they do not correspond to the facts and circumstances of the fire. Nor do we like the fact that the language of the admissions is always substantially exactly the same and is very brief, whether it is quoted from Kristoff or (in one instance) from Grossman, who is alleged, after having emphatically told Kristoff in Kassman's presence that he must never under any circumstances say anything about Black Tom, to have told

Kassman at a later interview alone just what Kristoff told Kassman and in the same brief, crisp language. We are more than suspicious, we disbelieve, in fact, when Kristoff is alleged to have introduced Kassman to Grossman's favor by telling him that Kassman is not an anarchist. Grossman is not an anarchist. The evidence convinces us that he is a respectable citizen. He has been a member of the Republican County Committee in his county for 15 years. Rigney tells us that his father-in-law lived in Grossman's house with him about 10 years and always spoke in the highest terms of him. Grossman is a cautious man. And he is easily scared. We attribute much of the confusion and contradiction in his testimony partly to the fact that he was scared—not because of conscious complicity with a criminal, but by the nature of the occasion—and partly to the fact that he is deaf. We get no unfavorable impression from Grossman's testimony, and we
312 are particularly impressed by the fact that he refused to testify until assured that some representative of the United States Government would be present.

But to return to Kassman. The admission in each case is that Kristoff worked with some German group. Kristoff never naturally used such an expression as "German group". This is Kassman's language; he was employed, as he says, to find Kristoff's connection with some German group, and this is language which he puts in Kristoff's mouth, though of course it may be a substantially accurate transposition of something Kristoff said. Kassman pressed Kristoff for names, and says that Kristoff said he would tell him later, but Kristoff never did.

The omissions in the reports are very remarkable. In substance the reports are composed of anarchists, lunches, and suppers, and brief categorical statements about Kassman's desire to destroy, Kristoff's unwillingness to join Kassman in sabotage because of police, and Kristoff's admissions about Black Tom.

One singular omission is that Kristoff does not congregate with other German agents. The urge to congregate is in all the other testimony the most marked characteristic of all German agents. But we hear nothing of Kristoff's meeting other German agents or even sympathizers. No name appears even of all the various Germans mentioned

in our other testimony. And the admissions are brief and rare episodes in a long series of uneventful, common-place stuff. We even doubt whether "anarchists" as used by Kassman really means "anarchists" in any accurate sense.

Another doubt—the most important perhaps—arises from the absence of conversations about Mrs. Rushnak, Mrs. Chapman, about Kristoff's supposed travels in the west, about Grantnor, about Kristoff's alibi, etc. We can feel sure that Kassman was not put on this job without

314 being supplied with all the information the people who employed him already had. His natural approach towards getting information from Kristoff

would not be this anarchistic talk and the ridiculously erude, unskillful talk—from the point of view of a man supposed to be a detective—about munitions and about Black Tom itself. He would naturally begin on Kristoff with talk about the west, the cities where Kristoff told the police he had been, to see if Kristoff really knew about the cities and said anything about the trip, whom he was with, what he did. After Kristoff began talking about his arrest by the police, Kassman would have a perfect opening for talking over the whole story, the trip, Grantnor, whom Kristoff and Grantnor saw on the trip, Mrs. Rushnak, Mrs. Chapman, the alibi, what he really did the night of the fire, whether he was excited when he got home and why and the "What I do". It is inconceivable that Kassman did not go into all these subjects with Kristoff in the course of the six months he followed him up. Either Kassman was a fool, or he had those talks and made reports about them which we have not got. If he got so intimate with Kristoff as to get confessions about Black Tom, he would have found no difficulty in getting Kristoff to talk over his whole story to the police. Kristoff would have been rather proud that he got away from the police, would have enjoyed his cleverness in producing a story from which they could make nothing, would have talked freely about Rigney, King, Charlock, and Green, who had examined him and tried to get him to confess. We hear nothing about any of these things.

Kristoff's experience with detectives was not at an end, even when Kassman was taken off his track. In 1921 he was arrested in Albany and while in jail there another

detective was placed with him in the guise of a prisoner and attempted to gain his confidence and secure admissions. Nothing came of this. At the same time he was examined with great thoroughness by counsel for the Lehigh Valley and by others. Kristoff seems to have
 314 professed willingness to help them in every way, probably with the idea of thereby securing his release from jail, but we get nothing whatever except that he was ready, if he could be taken to Philadelphia, to point out a house which he thought was used as a rendezvous by German agents. The court granted an order for his removal from jail under guard to visit Philadelphia, but we do not even learn that they took him there. They did at least take him to New York where he was confronted with Mrs. Rushnak and Mrs. Chapman, and a strenuous effort was made by all concerned to get him to admit Black Tom. He denied all connection with Black Tom. It also appears in close connection with this story that Mrs. Rushnak was in 1918 under surveillance of a woman detective in the guise of a lodger in her house. This was evidently done for the purpose of securing evidence from Mrs. Rushnak that Kristoff came home late the night of the fire. It seems singular that this should have been necessary, but doubtless Mrs. Rushnak had in the interval between 1916 and 1918 denied this story. The woman detective did report that Mrs. Rushnak finally admitted to her that Kristoff came home late, but she insisted at the same time that Kristoff not infrequently came home late, and that he was absolutely innocent, and added that she had merely made it easier for him to secure his release from the police in 1916 by denying that he came home late.

Apart from Kristoff's supposed statement that he worked in some unidentified German group, we have no connection of Kristoff with Germans except his possible connection with Hinsch. His group statement certainly is not enough for us. We have to be convinced that Hinsch was Grantnor or Grantsor or Graentnor in order to get a good start on the idea that Hinsch through Kristoff was responsible for Black Tom. His Grantsor story must be connected up with Hinsch. In his own evidence there is no such connection except his meeting Grantnor later in New York when
 315 Grantnor told Kristoff he could find him at the Me-

Alpin Hotel. This is where German agents sometimes roomed, and it is argued that this statement connected him with Hinsch. But it seems hardly likely that Hinsch would have mentioned the McAlpin if he was trying to get rid of Kristoff. He would have given him some fictitious address or some address which had no relation to Germans.

The only evidence worth considering that Hinsch was Grantnor is the evidence that Hinsch called himself Grantnor. This comes from Herrmann and Hadler. It seems possible, but we regard the evidence of Herrmann as wholly unreliable.

When Herrmann appeared before the American and German agents at Washington he told the Agents that he could not remember any Grantsor or Gransor. This was on his arrival from Chile after he had decided to testify in behalf of the claimants, but before his formal examination. He was then asked to write out his own story which he did that night, and in this story he speaks of Hinsch calling himself Grantnor, and corroborates it by relating that as a joke Hinsch called him Rodriguez just after the Kingsland fire, and that he retorted by calling Hinsch Grantnor. In his cross-examination about his complete failure to remember Grantnor or Grantsor at first, it seems plainly apparent that he had been reminded of Grantnor in conversation after his failure to remember, and also that the question of Grantnor had been the subject of discussion on his journey from Chile. Grantnor, as we have said, is the missing link in this part of the story, and this failure of Herrmann to remember the name at all is a stumbling block to believing what he later says on this point.

Herrmann also was very doubtful about the spelling of the name. He tries twice to spell it and each time gives alternatives, Grantnor and Graentnor, though no German could think that the name, if pronounced in English fashion, could possibly be spelled Graentnor.

316 Herrmann also says he had heard Hilken call Hinsch Grantnor, but Hilken, one thing to his credit, does not even testify that Hinsch used the name Grantnor, and Hilken knew Hinsch better than anyone else. Hilken even testifies that he never heard of Grantnor.

Hadler's testimony as a whole is unconvincing. If he had told only about Hinsch's claims in Mexico to credit for Black Tom and Kingsland we would be more inclined to believe him. But his identification of Wozniak is nonsense in itself, and particularly so as we think that Wozniak never was in Mexico. And we take no stock in his story of the frequent repetition of the Rodriguez-Grantnor joke. It would not have been a joke at all in Mexico for there seems to be no doubt that Herrmann called himself Rodriguez there. But the most convincing point about this evidence by Hadler is that this joke, if it ever happened, was first made in the United States immediately after the Kingsland fire. We do not believe that both Herrmann and Hinsch were so lacking in humor that they continued to work this joke after they got to Mexico, and in the presence of such a person as Hadler. It is the kind of joke that they would keep for their own amusement, even if one can imagine that it continued to amuse them. Hadler carried this joke too far.

One is rather inclined to regard Hinsch's story that he gave up sabotage when he took over the *Deutschland* work as quite likely to be true. He may not have done this at once, but it seems more than likely that he would not while the *Deutschland* was at Baltimore have been active in sabotage. We do not regard the question whether Hinsch was absent from Baltimore during the two days before Black Tom as important in itself. He did not need to be absent, if they had been planning Black Tom for some time. Its importance relates only to Hinsch's credibility, and
 317 it does not have much importance from this point of view. It has some bearing on the credibility of other witnesses also. Our impression is that Hinsch was not absent from Baltimore at this time.

The fact that Hinsch let Herrmann stay around Baltimore, and that Herrmann probably did some things or talked of some things in connection with sabotage at this time, and the talk about the pencils which Herrmann seems to have had with him at this time, tends against Hinsch's claim that he cut loose from sabotage. We would guess that Herrmann was not really doing much but talk and plan, and that Herrmann himself, particularly when the *Deutschland* was there, was doing nothing but work about

her. And it is of course conceivable that we are wrong in disbelieving Marguerre's evidence that Herrmann was to take no action against munition plants or American property unless the United States entered the war. We do not believe that Hinsch would have mixed up sabotage so closely with the *Deutschland*, either by taking part in it himself or by letting Herrmann work on the *Deutschland* if Herrmann was then active in sabotage.

In certain cases an accumulation of items, each in itself too doubtful to be relied upon but all leading in the same direction, results in reasonable certainty. The evidence of fact in this case has pointed in a number of different directions, but even when some special part of the evidence has pointed in some one direction it has failed to carry conviction. The Kristoff evidence with which we have dealt comes the nearest to leading somewhere.

We cannot be sure that Kristoff did not set fire to Black Tom or take some part in so doing. We cannot be sure that Graentsor, or Grantnor, or Graentnor was not Hinsch, and that Hinsch did not employ Kristoff and others who are unknown. But it will sufficiently appear from the fore-

going that, as we have said, the evidence falls far short of enabling us to reach the point, not merely of holding Germany responsible for the fire, but of thinking that her agents must have been the cause, even though the proof is lacking.

Done at Hamburg October 16, 1930.

ROLAND W. BOYDEN,

Umpire.

CHANDLER P. ANDERSON,

American Commissioner.

W. KIESSELBACH,

German Commissioner.

Washington, D. C., March 3, 1939.

Colonel Christopher B. Garnett
American Commissioner
Mixed Claims Commission
United States and Germany
State Department
Washington, D. C.

Dear Colonel Garnett:

To your letter of today I beg to reply:

We made a stipulation in the presence of Justice Roberts about one thing: That no future disagreement of agreement of ours should bear on the elements of the case or part of the case, but that our future agreement or disagreement should bear on the ultimate decision only. That we had not come to an ultimate decision is evidenced, I should say, by the fact that we continued our deliberations for at least two full sessions after the stage which you allude to in your letter and which you, mistakenly, I suppose, consider as a stage of disagreement.

I surely reserved any decision of mine with respect to the question as to whether the cases should be reopened or not. This was a necessary consequence of the point of view held by all three of us, viz. that there could be no reopening, if the new decision on the old and new evidence taken together should be identical in tenor with the Hamburg-Decision.

But for this very reason I reserved also my decision with respect to the question as to whether the Hamburg-Decision had been reached upon false and fraudulent evidence. Certainly I put before you the doubts which might militate against such an assumption. But from reaching a decision about this point which might be considered as a definite agreement or disagreement I naturally refrained for the very reason that any such decision could be dispensed with, if the deliberations about the other point (identity of ultimate decision on the whole evidence with Hamburg-Decision) led to a result not favorable to the claimants. I never should have formally disagreed on *anything* in this case without giving a fully substantiated written opinion.

How far we were from any agreement or disagreement may be best evidenced by the fact that none of us had even touched upon the subject of the nationality of the Canadian Car Agency, although you yourself will hardly entertain any doubt that this question of jurisdiction or may be of the substance of the case would be a part and topic of any decision, be it as to fraud or be it as to merits, in the Kingsland matter.

Please do not mistake this letter itself as a statement of an agreement or a disagreement. After my retirement no letter of mine can have any such meaning. My present letter deals with the past. You spoke to me about the record and I am answering that.

Very truly yours,

(sgd.) DR. V. F. L. H. HUECKING.

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Exhibit C

Washington, D. C., July 11, 1939.

Informal Translation

German Embassy.

Mr. Secretary of State:

By direction of my Government I have the honor to make representations with Your Excellency regarding the following occurrences in the proceedings before the Mixed Claims Commission, United States and Germany, which urgently call for immediate remedy:

According to communications received by the German Embassy, the American Agent as well as the attorneys of the American and Canadian claimants in the Black Tom and Kingsland cases are engaged in preparing awards to be submitted for signature to the Rump-Commission consisting at the present time of the American Umpire and the American Commissioner. These steps are the direct result of a ruling made by the American Umpire at the meeting of the Rump-Commission on June 15th, 1939, granting without hesitation a motion of the American Agent for awards and stating that "the Commission is prepared to sign awards to be submitted by the American Agent if approved by the Commission as to form".

In view of the Agreement entered into between the German Government and the Government of the United States on August 10, 1922, as well as in view of two unambiguous decisions of the fully constituted Commission and an Agreement between the two Agents concerning the procedure to be followed in the instant cases, this ruling of the Umpire is an inconceivable occurrence which is without precedent in the practice of international Tribunals and Commissions. The issues, involved in this ruling, 321 namely, the issue of Germany's responsibility for the damages arising from the explosions and fires and the issue of the amount of damages, were not before the Commission in the pending procedure dealing with the third petition for rehearing. On the contrary, they have been reserved for later stages of the proceedings in which Germany has the right to file evidence and briefs.

The American Agent's motion for awards has never been discussed between the German and the American Commissioners and has not even been brought to the knowledge of the German Agent. There is not the remotest possibility to say that here a disagreement existed between the two National Commissioners, which is an indispensable prerequisite to any action of the Umpire. Under no circumstances did the American Umpire have any authority to deal with the motion for awards, still less to grant it.

In order to justify his motion for awards the American Agent did not refer to facts contained in the record but contended that apparently the German Government was not willing further to participate in the proceedings before the Commission and wanted to avoid a final conclusion. This was an entirely arbitrary interpretation by the American Agent of communications of the retired German Commissioner and of the German Embassy. The written communications of the retired German Commissioner to the American members of the Commission and the notes of the German Embassy to the Secretary of State, dated March 24th and June 10th, 1939, relied on by the American Agent do not contain a single word that might 322 justify his contentions. In this connection I feel constrained emphatically to point out that the communications of the retired German Commissioner referred

to by the American Agent have not been completely made public. The American Commissioner has failed to produce or even to mention an important letter to him from the former German Commissioner, dated March 3rd, 1939, copy of which I am attaching to this note, although he spread upon the minutes and included in his opinion, the other letters exchanged between the three members of the Commission, thus conveying the impression that the letters referred to by him constituted the complete correspondence. It is patent that the ruling of the American Umpire relative to the entry of awards as well as any award that might be signed by the Rump-Commission consisting of the American Umpire and the American Commissioner is null and void. Payments which the American and Canadian claimants may attempt to obtain from the Treasury Department of the United States on the basis of such supposed "awards" would be devoid of any legal basis and would seriously violate the rights of American and German creditors who have valid Claims against the German Special Deposit Account.

By direction of my Government I therefore protest most emphatically against the American Umpire's ruling to grant "awards" in favor of the American and the Canadian claimants as well as against all steps of the American Agent taken in the past or to be taken in the future in order to obtain such "awards". At the same time I request Your Excellency to inform the Treasury Department of the United States of this protest and of the conclusion of my Government that "awards" that might be entered by the Rump-Commission are void.

I shall take occasion in a subsequent note to outline in detail the above-mentioned violations of procedure and all other serious irregularities that have occurred in the proceedings before the Commission since March 1st; more particularly the unilateral calling of a meeting of the Commission by the American Commissioner who has no authority to do so, and the decision of the American Umpire on the petition for rehearing of May 4th, 1933, which is likewise void. In the subsequent note I shall furthermore take occasion to express the expectation of my Government that the Government of the United States will cooperate with the German Government in order to restore the basis upon

which the work of the Commission can be accomplished in a regular way.

In the present note, I have confined myself to the question of the contemplated "awards", since this matter is particularly urgent in view of the preparations being made by the American Agent and by the attorneys of the American and the Canadian claimants.

Accept, Mr. Secretary of State, the renewed assurances of my highest consideration.

(Sgd.) THOMSEN.

324 *Defendants' Motion to Dismiss the Complaint and the Bill of Intervention*

Filed December 15, 1939

Cordell Hull, Secretary of State, and Henry Morgenthau, Jr., Secretary of the Treasury, defendants herein, move the Court as follows:

1. To dismiss the action because the complaint and the bill of intervention fail to state a claim against defendants upon which relief can be granted.

2. To dismiss the action because the Court lacks jurisdiction to review the action of the Mixed Claims Commission, United States and Germany.

3. To dismiss the action because the Court lacks jurisdiction to determine whether the said Commission as constituted on October 30, 1939, had jurisdiction to make the awards entered on that date.

325 4. To dismiss the action because the Court lacks jurisdiction to restrain and enjoin the Secretary of State from certifying to the Secretary of the Treasury the awards entered by the said Commission on October 30, 1939.

5. To dismiss the action because the Court lacks jurisdiction to restrain and enjoin the Secretary of the Treasury from paying awards of the said Commission as certified to him by the Secretary of State.

6. To dismiss the action on the ground that the Court lacks jurisdiction because the plaintiff and the intervenor-plaintiff have no standing to raise the issues sought to be raised in the complaint and in the bill of intervention.

7. To dismiss the action on the ground that the Court lacks jurisdiction because the plaintiff and the intervener-plaintiff have no standing to sue inasmuch as they have no right or interest in the fund out of which awards are paid which can be infringed by payment of the awards entered by the said Commission on October 30, 1939.

FRANCIS M. SHEA

Assistant Attorney General

FRANCIS J. McNAMARA

RAWLINGS RAGLAND

*Special Assistants to the
Attorney General.*

Attorneys for Defendants,

Washington, D. C.

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Opinion

Filed January 3, 1940

On August 10, 1922, an agreement was entered between the United States and Germany for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty of August 25, 1921, in respect to claims of nationals of the United States against Germany for loss, damage or injury to their persons or property by reasons of acts of the German Government or of its agents since July 31, 1914, a copy of which Agreement is annexed to the complaint herein as Exhibit A.

Pursuant to said agreement, the Commission therein provided for was subsequently created, which Commission was and is known as Mixed Claims Commission, United States and Germany, and an American Commissioner, a German Commissioner and an Umpire were appointed to said Commission.

In or about March, 1927, the United States of America, by Robert W. Bonyne, Agent, filed claims with the Commission on behalf of Intervener Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company and others, arising out of the destruction of property by reason of explosions at Black

Tom, New Jersey, in 1916, and at Kingsland, New Jersey in 1917.

In October, 1930, the Commission dismissed the claims filed by the United States on behalf of the said intervener. Two petitions for a rehearing of these claims were denied. Finally however a third petition for a reopening and rehearing was filed. The German and American Commissioners disagreed as to the power of the Commission to set aside the first decision, but the Umpire agreed with the American Commissioner and the two held that the power existed. A further hearing was had but before a decision was had the German Commissioner resigned. Thereafter however the American Commissioner and the Umpire set aside the original decision dismissing these claims and allowed them.

On March 10, 1928, the Congress of the United States the so-called Settlement of War Claims Act of 1928 (45 Stat. 254), which Act

(a) created in the United States Treasury a German Special Deposit Account, composed in part of all sums invested or transferred by the Alien Property Custodian under the provisions of Section 25 of the Trading with the Enemy Act, as amended, and of all money received by the United States in respect of claims against Germany on account of the awards of the Mixed Claims Commission;

(b) directed the Secretary of State from time to time to certify to the Secretary of the Treasury the awards of the Mixed Claims Commission; and

(c) directed the Secretary of the Treasury to pay, out of the aforesaid German Special Deposit Account, an amount equal to the principal of each award so certified, plus interest thereon in accordance with the award.

The funds now available to the aforesaid German Special deposit Account are, and at all times since October 30, 1939, have been, sufficient to pay to the sabotage claimants approximately the principal amounts of their respective awards.

In accordance with the Settlement of War Claims Act of 1928, as amended, the Secretary of State, on or about October 31, 1939, certified said awards to the Secretary of the Treasury, and thereafter substantially all the holders of said awards, including Intervener, duly filed with the Sec-

retary of the Treasury applications for payment thereof.

The plaintiff, the owner of a claim which had been allowed by the Commission, has filed its complaint to enjoin the defendants, the Secretary of State and the Secretary of the Treasury, from paying to the intervening defendants the

awards made by the Commission, upon the chief
328 grounds that the Commission had no power to grant a rehearing; that the award to the said intervenor

was not made by the Commission, as it could not act when composed of only one Commissioner and the Umpire; that the Umpire could only act in the event that the two Commissioners disagreed, and there being only one Commissioner at that time, there could be no disagreement, especially as the rules made by the Commission provided for written notice of the disagreement; that in as much as the fund set aside by Congress was insufficient to pay in full all the claims allowed by the Commission if the claim of the intervenor should be paid, the plaintiff would receive less than the amount of its claim as fixed by the Commission.

The intervening defendants have answered the complaint and have moved for a summary judgment. The Secretary of the Treasury has moved to dismiss the complaint. Before the filing of the complaint the Secretary of State had already certified to the Secretary of the Treasury the award of the Commission in favor of the intervenor, and the suit therefore will be dismissed as to him, being moot.

In my opinion the court has no power to grant the relief sought by the plaintiff. The claims made before the Commission were the claims of the United States. Whether these claims were properly allowed or not was a question to be raised by the United States and not by individuals who might be wronged by the action of the Commission. If there was any breach of the treaty between the two governments the only recourse would be by action of the contracting parties. The act of Congress of March 10, 1928, directed the Secretary of State to certify from time to time to the Secretary of the Treasury the awards of the Mixed Claims Commission and directed the Secretary of the Treasury to pay out those amounts. The Secretary of State has certified to the Secretary of the Treasury the award of which the plaintiff complains, and under the terms of the act of Congress it is the duty of the Secretary to pay the

awards. It is true that the plaintiff claims (and I
 329 think that this is its strongest claim) that the award
 was not made by the Commission, as the Commission
 could not function after one of the Commissioners had
 resigned, but so far as the fund in the treasury of the United
 States is concerned, the question was one to be decided by
 the Secretary of State, and whether he decided rightly or
 wrongly the court cannot prevent the payment of the claim.

No case has been cited involving the precise question
 here, but while this fact may not be decisive, it is persuasive.
 The cases which have been cited including *Mellon v. Orinoco Iron Co.*,
 266 U. S. 121, involve the ownership of a claim which has
 been allowed, and do not involve the propriety of an allowance
 of a claim, but whether it has been allowed to the right party.
 The claims are the claims of the United States and if the
 officer of the United States to whom Congress has given the
 power of determining whether the Commission has allowed a
 claim has acted, the courts have no power to set aside the
 allowance of the claim.

As there is no dispute as to the facts upon which this
 opinion is based, the motion for a summary judgment should
 be granted, as also should the motion of the defendant Secretary
 of the Treasury to dismiss the complaint.

JENNINGS BAILEY,

Justice.

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Judgment

Filed January 6, 1940

This action came on to be heard at this term upon the
 motion of the intervener-defendant Lehigh Valley Railroad
 Company on behalf of itself and of other claimants on
 whose behalf awards were granted to the United States by
 the Mixed Claims Commission, United States and Germany,
 on October 30, 1939, for summary judgment dismissing
 the complaint of the plaintiff Z. & F. Assets Realization
 Corporation and the bill of intervention of the plaintiff-intervener
 American-Hawaiian Steamship Company, and also upon the
 motion of the defendants to dismiss the complaint of the
 plaintiff and the bill of intervention of the intervener-plaintiff,
 which were argued by counsel, and thereupon, upon consideration
 thereof and upon the opin-

ion of this Court filed herein, it is this 5th day of January, 1940 -

Adjudged, Ordered and Decreed as follows:

(1) That the motion of intervener-defendant Lehigh Valley Railroad Company for summary judgment dismissing the complaint of the plaintiff and the bill of intervention of this intervener-plaintiff and the motion of the defendants to dismiss said complaint and said bill of intervention be, and they hereby are, granted.

(2) That the complaint of plaintiff and the bill of intervention of intervener-plaintiff be, and they hereby are, dismissed.

The cross-claim of intervener-defendant Lehigh Valley Railroad Company against Henry Morgenthau, Jr., Secretary of the Treasury, and the motion of the cross-claimant for summary judgment upon said cross-claim have not been considered and remain pending to be hereafter disposed of.

JENNINGS BAILEY,

Justice.

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Notice of Appeal

Filed January 6, 1940

Notice is hereby given that Z. & F. Assets Realization Corporation, plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment granting the motion of intervener-defendant Lehigh Valley Railroad Company for summary judgment dismissing the complaint of the plaintiff and the bill of intervention of the intervener-plaintiff and the motion of the defendants to dismiss said complaint and said bill of intervention entered on the 6th day of January, 1940, and from the whole and every part of said judgment.

Dated, Washington, D. C., January 6, 1940.

HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
FRANK ROBERSON,

Attorneys for Plaintiff,

Munsey Building,
Washington, D. C.

333 *Intervener-Plaintiff's Amended Notice of Appeal*

Filed January 8, 1940

Notice is hereby given that American-Hawaiian Steamship Company, intervener-plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment granting the motion of the intervener-defendant, Lehigh Valley Railroad Company, for summary judgment dismissing the complaint of the plaintiff and the bill of intervention of the intervener-plaintiff and also granting the motion of the defendants to dismiss the complaint and the bill of intervention, entered on the sixth day of January, 1940, and from the whole of and every part of said judgment.

Dated, Washington, D. C., January sixth, 1940.

FRED K. NIELSEN,
Attorney for Intervener-Plaintiff,
Union Trust Building,
Washington, D. C.

334 *Motion for Reargument or Correction of Opinion, Etc.,*

Filed January 18, 1940

Plaintiff moves upon the pleadings herein and upon all papers before the Court upon the motion for summary judgment made by the defendant-intervener, and upon the motion by the defendants for a dismissal of the complaint, and upon the annexed affidavit and exhibits thereto annexed, for an order directing a reargument of the motion for summary judgment made by the defendant-intervener and of the motion made by the defendants for a dismissal of the complaint, and for a vacatur of the judgment entered upon the opinion herein and upon such reargument for an order denying the motions for summary judgment and for a dismissal of the complaint, or, in the alternative, for an order correcting the opinion herein in accordance with the facts so that the following sentence from the opinion of Justice Bailey:

335 "Before the filing of the complaint, the Secretary of State had already certified to the Secretary of the Treasury the award of the Commission in favor of the intervenor,"

shall read:

"After the filing of the complaint, the Secretary of State certified to the Secretary of the Treasury the award of the Commission in favor of the intervenor,"

and for leave to file the annexed affidavit and exhibits thereto annexed, as submitted in opposition to the motion for summary judgment, and for such other and further relief as to the Court may seem proper.

January 17, 1940.

HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
FRANK ROBERSON,
Attorneys for Plaintiff,
Munsey Building,
Washington, D. C.

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Affidavit.

Filed January 18, 1940

District of Columbia, ss.:

John F. Condon, Jr., being duly sworn, deposes and says: I am one of the attorneys for the plaintiff herein.

On January 3, 1940, Justice Bailey filed an opinion directing that the motion for summary judgment made by the defendant-intervener, and the motion of the Secretary of the Treasury to dismiss the complaint, be granted. Further, and upon the finding that as to the defendant Hull the action was moot, the court directed the dismissal of the complaint as to said Hull. Upon the basis of said opinion a judgment was entered on the 6th day of January, 1940, from which judgment an appeal was duly taken on said day.

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The action was brought to declare void the alleged awards granted on October 30, 1939 to the defendant-intervener and other holders of awards made by the purported Mixed Claims Commission, United States and Germany, pursuant to the decisions of said Commission

dated June 15, 1939 and October 30, 1939; the holders of these awards will be hereinafter called "Sabotage Claimants", and the awards "Sabotage Awards." Plaintiff, in its complaint, prayed for an injunction that the defendant Hull be enjoined from certifying to the Secretary of the Treasury the said awards, and the Secretary of the Treasury be restrained from paying the same.

The plaintiff, Z. & F. Assets Realization Corporation, is a holder of five awards granted prior to said last mentioned dates, and brings this action in behalf of itself and all other American holders of awards granted prior to said last mentioned date.

My investigation has revealed the following facts:

The complaint herein was filed on October 31, 1939 at 9:05 A. M. of that day. The sabotage awards were 153 in number and were entered on October 30, 1939, and copies thereof were sent to the Secretary of State on October 30, 1939, the same day (moving affidavit on motion for summary judgment, page 36);

The Secretary of the Treasury was served with a copy of the summons and complaint at about 9:35 o'clock on the morning of October 31, 1939. (records of U. S. Marshall's office);

I am informed and believe that a United States Marshall tried to effect service that same morning upon the Secretary of State by delivering a copy of the same to Green H. Hackworth, the Legal Advisor of the Secretary of State that said Marshall stated the purpose of his visit to a representative of Mr. Hackworth's office at approximately 9:50 a. m. on October 31, 1939. Said Marshall was told Mr. Hackworth would not accept service until the following day. Said Marshall, however, succeeded in effecting service on Mr. Hackworth at 3:15 P. M. of October 31, 1939 (record of Marshall's office.)

338 In the meantime, certificates certifying to the awards by the Secretary of State were executed on October 31, 1939, presumably between 9:50 A. M. of that day and the time of the delivery thereof to the Secretary of the Treasury which I am informed and believe was at about 2:15 P.M. on October 31, 1939.

The Secretary of State and the Secretary of the Treasury were notified by letter dated the 25th day of October,

1939, and sent to them, respectively, on the 25th day of October, 1939; that the plaintiff would bring suit. Copies of said letters are hereto annexed marked "A" and "B".

Prior to that date, on June 23, 1939, there were sent to the Secretary of State and the Secretary of the Treasury, respectively, a protest by plaintiff against said sabotage awards, copies of which are hereto annexed marked "C" and "D".

Under the Federal Rules of Civil Procedure, an action is deemed commenced by the filing of the complaint.

Consequently, the following statement in the opinion of Justice Bailey:

"Before the filing of the complaint, the Secretary of State had already certified to the Secretary of the Treasury the award of the Commission in favor of the intervenor," is not incorrect.

In the moving papers upon the motion for summary judgment, there was no proof adduced supporting the claim made in the unsworn answer of the defendant-intervener that the awards were certified by the Department of State to the Secretary of the Treasury before the commencement of the action. The only paragraph relating to the date of the certification of the awards in the said moving papers was the following statement on page 36 of the moving affidavit:

"On October 31, 1939, the Secretary of State, pursuant to the provisions of Section 2(a) of the Settlement of War Claims Act of 1928, duly certified such awards to the Secretary of the Treasury for payment in accordance with the provisions of the Act."

Therefore, the statement in the opinion, above quoted, to the effect that the Secretary of State had certified to the Secretary of the Treasury, before the filing of the complaint, the awards of the Commission, is incorrect and not supported, I respectfully submit, by the facts nor by any statement in any of the papers before the Court submitted upon the hearing of this application.

Inasmuch as the motion of the defendant, Secretary of the Treasury, for an order dismissing the complaint was based solely upon the complaint, and since the complaint did not set forth the time of the certification by the Secretary of State of the alleged awards, there was nothing be-

fore the Court to support the above-quoted portion of the opinion.

In view of the fact that the defendant Hull was apprised before the commencement of the action that a suit would be brought by the plaintiff to enjoin him, and that the complaint was filed and the action, therefore, commenced before the certification by him to the Secretary of the Treasury, and in view, therefore, the plaintiff would be entitled to a mandatory injunction reinstating the status quo as of the time of the commencement of the action, the granting of the summary judgment on the ground that the certificate had been issued before the commencement of the action was erroneous and the motion for summary judgment should have been denied.

I, therefore, ask for a reargument of the motion for summary judgment made by the defendant-intervener and of the motion made by the defendants for a dismissal of the complaint, and for a vacatur of the judgment entered upon said opinion and upon such reargument for an order denying the motions for summary judgment and for a dismissal of the complaint, or, in the alternative, for an order correcting the opinion herein in accordance with the facts so that the following sentence from the opinion of Justice Bailey:

"Before the filing of the complaint, the Secretary of State had already certified to the Secretary of the Treasury the award of the Commission in favor of the intervener," shall read:

"After the filing of the complaint, the Secretary of State certified to the Secretary of the Treasury the award of the Commission in favor of the intervener," and for leave to file this affidavit, as submitted in opposition to the motion for summary judgment, and I ask for such other and further relief as to the Court may seem proper.

JOHN F. CONDON, JR.

Subscribed and Sworn to before me this 17th day of January, 1940.

(sgd) GRACE C. INGELS

Notary Public, D. C.

My Com. expires June 15, 1941.

(seal)

341

"A"

Z. & F. Assets Realization Corporation
c/o Rogers & Condon
52 Wall Street
New York

October 25, 1939.

HON. CORDELL HULL
Secretary of State,
Washington, D. C.

Dear Sir:

We are advised that, by order of the Umpire of the Mixed Claims Commission, United States and Germany, a meeting consisting of the Umpire and the American Commissioner, has been called for October 30, 1939 at ten o'clock, at which time it is the intention to render awards to the sabotage claimants.

As a holder of an award of the Mixed Claims Commission, still unpaid, we wrote you under date of June 23, 1939, and we renew our protests therein contained.

We beg herewith to advise you that, as soon as any award is made to the sabotage claimants, we will promptly commence an action to enjoin the payment of such awards until the question of the jurisdiction to make such awards, and other questions involved, will have been duly determined.

We ask you to take due notice thereof.

Yours respectfully,

Z. & F. ASSETS REALIZATION CORPORATION,
HUBERT E. ROGERS,
Secretary.

Z. & F. Assets Realization Corporation
c/o Rogers & Condon
52 Wall Street
New York

October 25, 1939.

Hon. Henry Morgenthau,
Secretary of the Treasury,
Washington, D. C.

Dear Sir:—

We are advised that, by order of the Umpire of the Mixed Claims Commission, United States and Germany, a meeting, consisting of the Umpire and the American Commissioner, has been called for October 30, 1939, at ten o'clock, at which time it is the intention to render awards to the sabotage claimants.

As a holder of an award of the Mixed Claims Commission, still unpaid, we wrote you under date of June 23, 1939, and we renew our protests therein contained.

We beg herewith to advise you that, as soon as any award is made to the sabotage claimants, we will promptly commence an action to enjoin the payment of such awards until the question of the jurisdiction to make such awards, and other questions involved, will have been duly determined.

We ask you to take due notice thereof.

Yours respectfully,

Z. & F. ASSETS REALIZATION CORPORATION,
By HUBERT E. ROGERS,
Secretary.

Z. & F. Assets Realization Corporation
c/o Rogers & Condon
52 Wall Street
New York, N. Y.

June 23, 1939.

Hon Cordell Hull,
Secretary of State,
Washington, D. C.

Dear Sir:—

Z. & F. Assets Realization Corporation of 100 Broadway, New York City, is the holder of awards heretofore granted by the Mixed Claims Commission—United States and Germany. On these awards there is still a balance unpaid, which balance is payable out of the special deposit fund created by the settlement of the War Claims Act which was enacted in March, 1928.

On May 4, 1933, there was filed by Lehigh Valley R. R. Co., Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Co. and others, petitioners, an application for a rehearing of the decisions dismissing their claims. On June 15, 1939, Mr. Justice Owen J. Roberts, in his alleged capacity as Umpire of said Mixed Claims Commission, purported to grant this application for rehearing and purported to direct the entry of awards in favor of the United States, for the benefit of the said petitioners; and we are informed that awards in favor of the United States, for the benefit of said petitioners, are about to be entered.

In our opinion, the granting of said application and the direction for the entry of said awards are null, void and of no effect, and we accordingly protest against any payment thereunder for the reasons, among others, hereinafter set forth, viz:

1. That the previous decisions of the Commission dismissing the claims of said petitioners were and are final and conclusive, and the Commission had no jurisdiction to grant a rehearing or to vacate its previous decision.

2. That before the granting of said application and on or about the 1st day of March, 1939, while the Commission was deliberating upon the question whether the said application for a rehearing should be granted, the German Com-

missioner resigned, and by reason of such resignation the Mixed Claims Commission was without any power or jurisdiction to take any action until a new German Commissioner was appointed.

3. That the statement in the opinion of Mr. Justice Roberts, delivered upon the granting of said application, that there was a disagreement between the German Commissioner and the American Commissioner, entitling him to decide the question of whether the application for a rehearing should be granted, is erroneous.

344 4. That the only question pending before the Commission at the alleged hearing on the 15th day of June, 1939, was the question whether the application for a rehearing should be granted and therefore, among other reasons, the direction for the entry of the awards was null and void.

5. That the direction for the entry of the awards was without notice and therefore was null and void.

6. That there never has been submitted to the two governments or their representatives or their agents or their commissioners the question of the amount of any damages suffered by said claimants, and there never has been submitted to the said Commission proofs of any damages suffered by said claimants, and therefore no basis exists for the entry of awards in any amount.

7. That the entry of an award in favor of the Agency of the Canadian Car & Foundry Company is wholly improper, in view of the fact that said Canadian corporation is entirely owned by a non-American national corporation, to wit, the Canadian Car & Foundry Company of Canada.

8. That other awards are directed to be entered in favor of other corporations whose beneficial ownership is non-American, and entry of awards in their favor is wholly without jurisdiction on the part of said Commission.

9. If said awards in favor of said petitioners under said opinion and direction of Mr. Justice Roberts are recognized, the said special deposit fund above mentioned will be materially diminished, if not entirely depleted, by the application thereof to the payment of such awards, all of which will result in depriving this corporation and others holding valid awards from receiving any further payments on their awards; since it is common knowledge that Germany

will not make payment on account of any awards granted by the Commission.

For the foregoing reasons, the undersigned respectfully protests against any payment by you under said awards directed by Mr. Justice Roberts in favor of the said Lehigh Valley R. R. Co., Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Co. and Others.

Yours respectfully,

Z. & F. ASSETS REALIZATION CORPORATION,
By HUBERT E. ROGERS,
Secretary—Hubert E. Rogers.

345

"D"

Z. & F. Assets Realization Corporation
c/o Rogers & Condon
52 Wall Street
New York, N. Y.

June 23, 1939

Hon. Henry Morgenthau,
Secretary of the Treasury,
Washington, D. C.

Dear Sir:

Z. & F. Assets Realization Corporation of 100 Broadway, New York City, is the holder of awards heretofore granted by the Mixed Claims Commission-United States and Germany. On these awards there is still a balance unpaid, which balance is payable out of the special deposit fund created by the settlement of the War Claims Act which was enacted in March, 1928.

On May 4, 1933, there was filed by Lehigh Valley RR Co., Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Co. and others, petitioners, an application for a rehearing of the decisions dismissing their claims. On June 15, 1939, Mr. Justice Owen J. Roberts, in his alleged capacity as Umpire of said Mixed Claims Commission, purported to grant this application for rehearing and purported to direct the entry of awards in favor of the United States, for the benefit of the said petitioners; and we are informed that awards in favor of the United States, for the benefit of said petitioners, are about to be entered.

In our opinion, the granting of said application and the direction for the entry of said awards are null, void, and of no effect, and we accordingly protest against any payment thereunder for the reasons, among others, hereinafter set forth, viz.:

1. That the previous decisions of the Commission dismissing the claims of said petitioners were and are final and conclusive, and the Commission had no jurisdiction to grant a rehearing or to vacate its previous decision.

2. That before the granting of said application and on or about the 1st day of March, 1939, while the Commission was deliberating upon the question whether the said application for a rehearing should be granted, the German Commissioner resigned, and by reason of such resignation the mixed Claims Commission was without any power or jurisdiction to take any action until a new German Commissioner was appointed.

3. That the statement in the opinion of Mr. Justice Roberts, delivered upon the granting of said application, that there was a disagreement between the German Commissioner and the American Commissioner, entitling him to decide the question of whether the application for a rehearing should be granted, is erroneous.

346 4. That the only question pending before the Commission at the alleged hearing on the 15th day of June, 1939, was the question whether the application for a rehearing should be granted and therefore, among other reasons, the direction for the entry of the awards was null and void.

5. That the direction for the entry of the awards was without notice and therefore was null and void.

6. That there never has been submitted to the two governments or their representatives or their agents or their commissioners the question of the amount of any damages suffered by said claimants, and there never has been submitted to the said Commission proofs of any damages suffered by said claimants, and therefore no basis exists for the entry of awards in any amount.

7. That the entry of an award in favor of the Agency of the Canadian Car & Foundry Company is wholly improper, in view of the fact that said Canadian corporation

is entirely owned by a non-American national corporation, to wit, the Canadian Car & Foundry Company of Canada.

8. That other awards are directed to be entered in favor of other corporations whose beneficial ownership is non-American, and entry of awards in their favor is wholly without jurisdiction on the part of said Commission.

9. If said awards in favor of said petitioners under said opinion and direction of Mr. Justice Roberts are recognized, the said special deposit fund above mentioned will be materially diminished, if not entirely depleted, by the application thereof to the payment of such awards, all of which will result in depriving this corporation and others holding valid awards from receiving any further payments on their awards, since it is common knowledge that Germany will not make payments on account of any awards granted by the Commission.

For the foregoing reasons, the undersigned respectfully protests against any payment by you under said awards directed by Mr. Justice Roberts in favor of the said Lehigh Valley RR Co., Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Co. and others.

Yours respectfully,

Z. & F. ASSETS REALIZATION CORPORATION
By (sgd) R. DAWSON
President

347 *Affidavit of Green H. Hackworth [in opposition to motion for reargument, etc.]*

Filed January 30, 1940

* * *

Green H. Hackworth being duly sworn deposes and says:

I am the Legal Adviser of the Department of State and am authorized by Cordell Hull, Secretary of State, to accept service on his behalf.

On the afternoon of October 31, 1939, I acknowledged on behalf of Cordell Hull, Secretary of State, receipt of service of summons and complaint in an action entitled Z. & F. Assets Realization Corporation, a Delaware corporation, v.

Cordell Hull, Secretary of State, and Henry Morgenthau, Jr., Secretary of the Treasury, in the United States District Court for the District of Columbia.

348 I am informed by James Alan Nash, Administrative Assistant, Legal Adviser's Office, Department of State, that all awards entered on October 30, 1939, by the Mixed Claims Commission, United States and Germany, had been certified to the Secretary of the Treasury by the Secretary of State and had been transmitted to the Treasury Department on October 31, 1939 but prior to the service of said summons and complaint.

On June 24, 1939, there was received at the Department of State a communication dated June 23, 1939, addressed to the Secretary of State by Hubert E. Rogers, Secretary, Z. & F. Assets Realization Corporation, a copy of which is annexed hereto as exhibit "1". Since said communication entered protest against "any payment" by the Secretary of State "under said awards directed by Mr. Justice Roberts in favor of the said Lehigh Valley RR Co., Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Co. and others", the Department of State, in its reply dated June 30, 1939, a copy of which is annexed hereto as exhibit "2", called attention to the fact that authority to make payment out of the German Special Deposit Account created by the Settlement of War Claims Act of 1928 is by the terms of that Act vested in the Secretary of the Treasury.

On October 26, 1939, there was received in the Department of State a further communication addressed to the Secretary of State by the said Hubert E. Rogers, a copy of which is annexed hereto as exhibit "3", renewing the protest contained in the above-mentioned communication of June 23, 1939, and stating an intention to commence an action "to enjoin the payment" of awards.

349 The receipt of said communication by the Department of State was acknowledged by a communication dated October 31, 1939, a copy of which is annexed hereto as exhibit "4".

That neither prior to the service of summons and complaint on October 31, 1939, nor prior to the filing of such complaint, did I have any notice or information that suit had been or would be instituted to enjoin the Secretary of

State from certifying awards of the Mixed Claims Commission, United States and Germany, as required by section 2(a) of the Settlement of War Claims Act of 1928. I further state, on information and belief, that the Secretary of State had no such prior notice.

(s) GREEN H. HACKWORTH

Subscribed and sworn to before me this 29th day of January 1940.

(s) PERCY F. ALLEN

(Seal)

Notary Public, D. C.

My commission expires June 14, 1942.

350

COPY

"1"

Z. & F. Assets Realization Corporation
c/o Rogers & Condon
52 Wall Street
New York, N. Y.

June 23, 1939.

Hon. Cordell Hull,
Secretary of State,
Washington, D. C.

Dear Sir:—

Z. & F. Assets Realization Corporation of 100 Broadway, New York City, is the holder of awards heretofore granted by the Mixed Claims Commission-United States and Germany. On these awards there is still a balance unpaid, which balance is payable out of the special deposit fund created by the settlement of the War Claims Act which was enacted in March, 1928.

On May 4, 1933, there was filed by Lehigh Valley RR Co., Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Co. and others, petitioners, an application for a rehearing of the decisions dismissing their claims. On June 15, 1939, Mr. Justice Owen J. Roberts, in his alleged capacity as Umpire of said Mixed Claims Commission, purported to grant this application for rehearing and purported to direct the entry of awards in favor of the United States, for the benefit of the said petitioner; and

we are informed that awards in favor of the United States, for the benefit of said petitioners, are about to be entered.

In our opinion, the granting of said application and the direction for the entry of said awards are null, void and of no effect, and we accordingly protest against any payment thereunder for the reasons, among others, hereinafter set forth, viz.:

1. That the previous decisions of the Commission dismissing the claims of said petitioners were and are final and conclusive, and the Commission had no jurisdiction to grant a rehearing or to vacate its previous decision.

2. That before the granting of said application and on or about the 1st day of March, 1939, while the Commission was deliberating upon the question whether the said application for a rehearing should be granted, the German Commissioner resigned, and by reason of such resignation the Mixed Claims Commission was without any power or jurisdiction to take any action until a new German Commissioner was appointed.

351 3. That the statement in the opinion of Mr. Justice Roberts, delivered upon the granting of said application, that there was a disagreement between the German Commissioner and the American Commissioner, entitling him to decide the question of whether the application for a rehearing should be granted, is erroneous.

4. That the only question pending before the Commission at the alleged hearing on the 15th day of June, 1939, was the question whether the application for a rehearing should be granted and therefore, among other reasons, the direction for the entry of the awards was null and void.

5. That the direction for the entry of the awards was without notice and therefore was null and void.

6. That there never has been submitted to the two governments or their representatives or their agents or their commissioners the question of the amount of any damages suffered by said claimants, and there never has been submitted to the said Commission proofs of any damages suffered by said claimants, and therefore no basis exists for the entry of awards in any amount.

7. That the entry of an award in favor of the Agency of the Canadian Car & Foundry Company is wholly improper, in view of the fact that said Canadian corporation is en-

tirely owned by a non-American national corporation, to wit, the Canadian Car & Foundry Company of Canada.

8. That other awards are directed to be entered in favor of other corporations whose beneficial ownership is non-American, and entry of awards in their favor is wholly without jurisdiction on the part of said Commission.

9. If said awards in favor of said petitioners under said opinion and direction of Mr. Justice Roberts are recognized, the said special deposit fund above mentioned will be materially diminished, if not entirely depleted, by the application thereof to the payment of such awards, all of which will result in depriving this corporation and others holding valid awards from receiving any further payments on their awards, since it is common knowledge that Germany will not make payment on account of any awards granted by the Commission.

For the foregoing reasons, the undersigned respectfully protests against any payment by you under said awards directed by Mr. Justice Roberts in favor of the said Lehigh Valley RR Co., Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Co. and others.

Yours respectfully,

Z. & F. ASSETS REALIZATION
CORPORATION

By (sgd) HUBERT E. ROGERS
Secretary—Hubert E. Rogers

File 462.11 L 5232/1011

352

"2"

Department of State
Washington

June 30, 1939

In reply refer to
Le 462.11 L 5232/1011

My dear Mr. Rogers:

The Department has received your letter of June 23, 1939 in which, with reference to the recent decision of the Mixed Claims Commission, United States and Germany, in certain so-called sabotage claims, the opinion is expressed that, for the reasons set out in your letter, the action taken by the Commission is null, void and of no effect.

With reference to your protest against any payment by the Secretary of State of such awards as may be entered by the Commission on behalf of the claimants to which you refer, I have to inform you that the authority to make payment out of the German Special Deposit Account created by the Settlement of War Claims Act of 1928 is by the terms of that act vested in the Secretary of the Treasury.

Sincerely yours,

For the Secretary of State:

GREEN H. HACKWORTH
Legal Adviser

Mr./Hubert E. Rogers,
Z. & F. Assets Realization Corporation,
Care of Rogers and Condon,
52 Wall Street,
New York, New York.

353

"5"

Z. & F. Assets Realization Corporation
c/o Rogers & Condon
52 Wall Street

New York, October 25, 1939.

Hon. Cordell Hull,
Secretary of State,
Washington, D. C.

Dear Sir:

We are advised that, by order of the Umpire of the Mixed Claims Commission, United States and Germany, a meeting, consisting of the Umpire and the American Commissioner, has been called for October 30, 1939 at ten o'clock, at which time it is the intention to render awards to the sabotage claimants.

As a holder of an award of the Mixed Claims Commission, still unpaid, we wrote you under date of June 23, 1939, and we renew our protests therein contained.

We beg herewith to advise you that, as soon as any award is made to the sabotage claimants, we will promptly commence an action to enjoin the payment of such awards until the question of the jurisdiction to make such awards,

and other questions involved, will have been duly determined.

We ask you to take due notice thereof.

Yours respectfully,

Z. & F. ASSETS REALIZATION
CORPORATION

By HUBERT E. ROGERS
Secretary

354

"4"

Department of State,
Washington

October 31, 1939

In reply refer to
Le 462.11 L 5232/1028

Z. and F. Assets Realization Corporation,
c/o Rogers and Condon,
52 Wall Street,
New York, New York.

Sirs:

Receipt is acknowledged of your communication of October 25, 1939 with reference to the proceedings of the Mixed Claims Commission, United States and Germany.

The Department notes your statement concerning your intention to enjoin the payment of any awards which may be rendered by the Commission in the so-called sabotage claims.

Very truly yours,

For the Secretary of State:

GREEN H. HACKWORTH
Legal Adviser

355 *Affidavit of James Alan Nash [in opposition
to motion for reargument, etc.]*

Filed January 30, 1940

James Alan Nash being duly sworn deposes and says:
I am the Administrative Assistant, Legal Adviser's office, Department of State.

During the forenoon of October 31, 1939, two individuals, one of whom identified himself as a representative of the United States Marshal's office, appeared at my office which adjoins the office of Green H. Hackworth, Legal Adviser, Department of State. The said representative stated that he had been referred to Green H. Hackworth by the office of the Secretary of State in connection with the service of a summons on the Secretary of State. I informed the representative that Green H. Hackworth was not in his office

and I suggested to the representative that he return 356 on the morning of the following day since Green H.

Hackworth was attending a conference and it was not known when he would be available on October 31, 1939. I did not tell the representative that Green H. Hackworth would not accept service until the following day, as alleged in the affidavit of John F. Condon, Jr., executed on January 17, 1940. The representative stated that he would return on the afternoon of the same day, which he did, at which time I escorted him into the office of Green H. Hackworth. Prior to that time the awards rendered by the Mixed Claims Commission, United States and Germany, on October 30, 1939, had been certified to the Secretary of the Treasury by the Secretary of State and had been transmitted to the Treasury Department.

(s) JAMES ALAN NASH

Subscribed and sworn to before me this 29th day of January, 1940.

(s) PERCY F. ALLEN

Notary Public, D. C.

My commission expires June 14, 1942

357

Docket Entries

Date	Proceedings	
1939	Deposit for costs by—Roberson	
Oct 31	Complaint & Exhibit (1)	filed
—	Summons & copies (2) comp. issued Served	
	10/31/39	
Nov 7	Affidavit of service	

- Nov 14 Motion of Lehigh Valley R. R. Co. for leave to intervene as party defendant filed
Notice & proposed interveners answer by R H Wilmer
- " 20 Motion of Plff. for continuance to reply to motion to intervene & Points & Authorities filed
- " " Order ext. time for reply to motion to intervene to Nov 22/39. Hearing of motion set for same date—Proctor, J. (notified)
- " 22 Order permitting Intervention of Lehigh Valley R R Co., et al Proctor, J.
- " 22 Intervening answer of Lehigh Valley R R Co & Exh (3) filed
- " 22 Deposit by Wilmer for Intervening petition
- " 25 Mo. of American-Hawaiian Steamship Co. for leave to intervene, Notice, P & A & Ex (3) filed
- " 28 Affidavit of service of motion to intervene
- " 30 Motions of intervenor Lehigh Valley R R Co. for summary judgment and to dismiss.
Notice & Service. Points & Authorities —Exhibits (29) & Affts (2) filed
- " 30 Affidavits of D L Hatch as to service
- " " Points & Authorities of Intervenor filed
- Dec 5 Motion of Plff. to vacate service of papers on motion by intervenor for Summary Judgment.
Affidavit. Points & Authorities. Notice. Service. filed
- " 8 Plaintiffs notice to take deposition
- " 7 Order allowing Am-Hawaiian S.S. Co. to intervene & made additional party pff on condition.
Motions for summary judgt set for Dec 14/39, opposition to be filed by Dec. 13 & motion to vacate treated as withdrawn—Proctor, J. (notified)
- " 12 Intervening petition of American-Hawaiian Steamship Co. & Exh (1) by Fred. K. Nielson, Atty filed

- Dec 12 Deposit by Nielson for Int. Pet. Served.
(see file)
- " " Opposition of Blff Intervener to motion for
Summary Judgment. Service. Points &
Authorities filed
- " " Affidavit of service "
- " 13 Opposition by plf of motion of Lehigh Val-
ley R R. Intervenor filed
- " 15 Motion to dismiss complaint & intervening
petition. Proof of service. Points & Au-
thorities by McNamara on behalf of defts
#1 and 2 filed
- " 22 Affidavit of Lawrence Beattie "

358

- Jan 3 Opinion of Court (Bailey J)
- " 6 Order for summary judgment dismissing
complaint of plaintiff & bill of intervenor
plaintiff Am. Hawaiian S S Co. Cross
claim of defdt Intervenor Lehigh Valley
R R Co. v. Morgenthau Secy to remain
pending. & to be hereafter disposed.
(Signed 1/5/40 Bailey J
Notice to Roberson & Nielsen. Hatch in
Ct. McNamara, F. J. notified
- Jan 6 Notice of Appeal—Am. Hawaiian SS Co.—
(3 copies) filed 3 copies mailed. Filed
by F. K. Nielsen atty. for Intervener pltf.
- " 6 Notice of appeal—Z & F Assets Co.—filed
by F. Roberson: 3 copies mailed.
- " 6 Cert. copies judgment & dep by Hatch a
- " 6 Notices of appeals: (2) mailed to Francis
McNamara, Richard H. Wilmer (2) Fredk
K. Nielsen, Frank J. McNamara, Frank
Roberson
- " 8 Mailed to Mr. Nielsen: Brief on mo. dismiss,
Brief for summary judgment & errata
- " " Mailed to Frank Roberson: Testimony, Yale
Law Journal, agreement, Notes in oppo.
to mo. for sum. judt. by Moore oppo. to
mo. dismiss, memo in oppo. to mo. for
sum. judgt & disimiss complt

Docket Entries

(continued)

Date	Proceedings	
1940		
"	" Amended notice of appeal by intervenor plaintiff. Copies mailed to Attys McNamara, Rogers & Wilmer	filed
" 10	Cost Bond (\$250.00) on appeal. American-Hawaiian Steamship Co. with Aetna Casualty & Surety Co. surety	filed
" 10	Cost Bond (\$250.00) on appeal. Z. & F. Assets Realization Corp. with Aetna Casualty & Surety Co. surety	filed
" 13	Filed: Letter of F. Roberson to Crt; letter of R. H. Wilmer to Crt; letter of Mr. Nielsen to Crt.	
" 18	Plffs. mo. for reargument or correction of opinion, etc., Notice, P & A & ex (4) & aff. (1)	filed
Jan 22	Answer of Deft. Morgenthau Jr. to Intervenor—Defts Cross Claim	"
" 23	Plffs designation of record	"
" 29	Designation of record—Intervenor-deft. Lehigh Valley RR	"
" 30	Intervenor defts points & authorities in oppo to motion of 1/18/40	"
" "	Affidavits of Green S. Hackworth & John Alan Nash in opposition to motion of plffs. for reargument or correction of opinion, etc. Exh. 4. Affidavit	filed
" "	Designation of record of defendants Hull & Morgenthau	"

359 *Plaintiff-Appellant's Designation of Record on Appeal*

Filed January 23, 1940

Now comes Z. & F. Assets Realization Corporation, plaintiff, by its attorneys, Hubert E. Rogers, John F. Condon, Jr., Frank Roberson, and designates and directs the Clerk to print the parts of the record which they desire to have included in the transcript, said parts having been consid-

ered sufficient for the determination of the question raised on appeal, namely:

1. Bill of complaint filed on October 31, 1939, together with any date or time of filing thereon;
2. Summons;
3. Return of marshal of service on defendant, Hull, on form number 247;
- 360 4. Return of marshal of service on defendant, Morgenthau, on form number 247;
5. Defendant-intervener's answer and exhibits thereto annexed;
6. Bill of intervention of American-Hawaiian Steamship Company, the plaintiff-intervener;
7. Motion for summary judgment, dated November 30, 1939, together with affidavit of Harold H. Martin, verified the 28th day of November, 1939, and exhibits thereto annexed, omitting copies of the decisions of the Commission rendered by the Umpire, dated December 15, 1933, and June 15, 1939, which decisions are annexed to defendant-intervener's answer, affidavit of John J. McCloy, dated the 28th day of November, 1939, with exhibits thereto annexed, omitting form of application for payment (Exhibit 1);
8. Affidavit of Hubert E. Rogers, verified the 12th day of December, 1939, and exhibits thereto annexed;
9. Defendants' motion to dismiss the complaint and bill of intervention;
10. Opinion of Justice Bailey;
11. Judgment;
12. Motion papers on motion for reargument or for correction of opinion and stipulation in connection therewith and order thereon;
13. Docket entries.

Dated, Washington, D. C., January 23, 1940.

HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
FRANK ROBERSON,
Attorneys for Plaintiff,

Munsey Building,
Washington, D. C.

361 Receipt of a copy of the foregoing designation of record is hereby acknowledged.

Dated, January 23, 1940.

RICHARD H. WILMER
Attorney for Intervener-Defendant

FRED K. NIELSEN W.P.J.
Attorney for Intervener-Plaintiff

FRANCIS J. McNAMARA J.A.S.
Attorney for Defendants

362 *Intervener-Defendant-Appellee's Designation of Record on Appeal*

Filed January 29, 1940

Intervener-defendant and appellee files herewith its designation of the portions of the record to be contained in the record on appeal as follows:

1. Plaintiff's Notice of Appeal.
2. Intervener-Plaintiff's Amended Notice of Appeal.
3. Judgment appealed from.
4. Complaint (with affidavit or returns of service endorsed thereon).
5. Bill of Intervention of American-Hawaiian Steamship Company or in the alternative the Statement with respect to Bill of Intervention annexed hereto.
6. Answer and exhibits thereto (as amended by Order dated December 7, 1939) or in the alternative the Answer including exhibits and such portion of the Order dated December 7, 1939, as relates to such Answer.
7. Motions for Summary Judgment.
- 363 8. Affidavit of Harold H. Martin, and exhibits (exclusive of Exhibits 5 and 20, copies of which are annexed to Answer as Exhibits I and II) read in support of Motions.
9. Affidavit of John J. McCloy read in support of Motions, and exhibits thereto, exclusive of the printed form of application to Treasury for payment, but in lieu thereof the following statement:

"Exhibit I is Treasury form designated Department Circular No. 397 Accounts and Deposits, on which application to Secretary of Treasury for payment of awards of Mixed Claims Commission, United States and Germany, are made."

10. Affidavit of Hubert E. Rogers, and exhibits, read in opposition to Motions.

11. Motion to Dismiss.

12. Opinion

RICHARD H. WILMER,
Attorney for Intervener-Defendant,
Transportation Building,
Washington, D. C.

Dated Washington, D. C.,
January 29, 1940.

364

[Same Title]

Statement with respect to Bill of Intervention

The Bill of Intervention of American-Hawaiian Steamship Company is substantially identical with the complaint herein, except in the following respects:

(1) It adds the following two allegations which do not appear in any form in the original complaint:

"2. That American-Hawaiian Steamship Company of 90 Broad Street, City, County and State of New York, petitioner herein, is a corporation organized under the laws of the State of New Jersey.

"10. That the said Commission duly granted five awards in favor of the plaintiff, American-Hawaiian Steamship Company, which, with interest from certain dates to January 1, 1928, aggregate the sum of Four million six hundred twenty thousand one hundred thirty-one and 57/100 (\$4,620,131.57) Dollars, on which the plaintiff, American-Hawaiian Steamship Company, has received, on account, the sum of approximately Three million three hundred thousand (\$3,300,000) Dollars, leaving a balance unpaid in excess of One million two hundred fifty thousand (\$1,250,000) Dollars, which, with interest from January 1, 1928 to this date, makes a total aggregate unpaid balance in excess of Two million (\$2,000,000) Dollars."

(2) In paragraph "5" of the Bill of Intervention, the Mixed Claims Commission is described as "a mixed commission", whereas in the corresponding paragraph of the complaint (paragraph "4") it is described as "a mixed arbitral commission".

(3) Paragraph "26" of the Bill of Intervention, the substance of which corresponds to paragraph "24" of the complaint, reads as follows:

"On information and belief, that the said alleged American Commissioner, without notice to any German Commissioner or German Agent and without the presence of any German Commissioner or the German Agent, conferred with the American Agent and Counsel with respect
365 to the claims of the said claimants and the amount of the awards to be rendered in favor of the said claimants and thereupon the said alleged American Commissioner, without knowledge or consent of any German Commissioner or knowledge or consent of the German Agent, signed awards to the said claimants for the amounts so fixed and assessed by the American Agent."

(4) The Bill of Intervention of the American-Hawaiian Steamship Company is signed by Fred K. Nielsen as attorney.

366 *Defendants-Appellees' Designation of Record
on Appeal*

Filed January 30, 1940.

The defendants, Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of Treasury, appellees, file herewith their designation of the portions of the record to be contained in the record on appeal as follows:

1. Plaintiff's Notice of Appeal.
2. Intervener-Plaintiff's Amended Notice of Appeal.
3. Judgment appealed from.
4. Complaint (with affidavit on returns of service endorsed thereon).
5. Bill of Intervention of American-Hawaiian Steamship Company.
6. Answer and exhibits thereto (as amended by Order dated December 7, 1939) or in the alternative the Answer

and exhibits thereto and such portion of the Order dated December 7, 1939, as relates to such Answer.

7. Motions for Summary Judgment.

367 8. Affidavits of Harold H. Martin, and exhibits (exclusive of Exhibits 5 and 20, copies of which are annexed to Answer as Exhibits I and II) read in support of Motions.

9. Affidavit of John J. McCloy, and exhibits read in support of Motions.

10. Affidavit of Hubert E. Rogers, and exhibits, read in opposition to Motions.

11. Defendants' Motion to Dismiss.

12. Opinion.

13. If that part of the plaintiff's designation of record on appeal numbered 12 is included in the record on appeal, the affidavits of Green S. Hackworth and James Alan Nash in opposition to the Motion for Reargument or Correction of Opinion.

Dated Washington, D. C., January 30, 1940.

FRANCIS M. SHEA

Assistant Attorney General

FRANCIS J. McNAMARA

*Special Assistant to the
Attorney General*

368

Memoranda

January 10, 1940

Cost Bond (\$250.00) on appeal, American-Hawaiian Steamship Co. with Aetna Casualty & Surety Co., surety, filed.

Cost Bond (\$250.00) on appeal, Z. & F. Assets Realization Corp. with Aetna Casualty & Surety Co., surety, filed.

369

District Court of the United States
for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 368, both inclu-

sive, to be a true and correct transcript of the record according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 4598, Civil Action, wherein Z. & F. Assets Realization Corporation, a Delaware corporation, is Plaintiff, American-Hawaiian Steamship Company is Intervener-Plaintiff and Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of Treasury, are Defendants and Lehigh Valley Railroad Company is Intervener-Defendant, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of February, 1940.

C. E. STEWART,

(Seal)

Clerk.

Endorsed on Cover: No. 7596 Z. & F. Assets Realization Corporation et al., Appellants, vs. Hull et al. United States Court of Appeals for the District of Columbia. Filed Feb 3-1940 Joseph W. Stewart, Clerk

BLANK PAGE

370 United States Court of Appeals for the District of
Columbia Filed Feb 8-1940 Joseph W. Stewart,
Clerk

District Court of the United States for the
District of Columbia

No. 4598—Civil Action

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Cor-
poration, et al., *plaintiffs*

vs.

CORDELL HULL, Secretary of State, et al., *defendants*

I, Charles E. Stewart, Clerk of The District Court of the
United States for the District of Columbia, do hereby cer-
tify the annexed to be true and correct copies of the original
Summons, and Affidavit of John F. Condon, Jr., as they
appear of record in the Clerk's Office of said Court in the
above-entitled cause.

In Testimony Whereof, I hereunto subscribe my name
and affix the seal of said Court at the City of Washington,
this 8th day of February, 1940.

CHARLES E. STEWART,
Clerk.

By LYDIA M. GARDINER,
Assistant Clerk.

(Seal)

371 Summons in a Civil Action D. C. Form No. 45 Rev.
Issued October 31, 1939

District Court of the United States for the
District of Columbia

..... Division

Civil Action File No. 4598

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation. *Plaintiff*

v.

CORDELL HULL, Secretary of State.
HENRY MORGENTHAU, Secretary of the Treasury.
Defendants

Summons

To the above named Defendant:

You are hereby summoned and required to serve upon Frank Robertson, plaintiff's attorney, whose address is Munsey Building, Washington, D. C., an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CHARLES E. STEWART,
Clerk of Court.

By ANDREW A. HORNER,
Deputy Clerk.

Date: Oct. 31st. 1939.

(Seal of Court)

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

372 *Return on Service of Writ*

I hereby certify and return, that on the 31st day of October 1939, I received the within summons and executed same by serving the defendants Cordell Hull Secretary of State by serving Green H Hackworth Legal Adviser

PERSONALLY 10-31-39

Henry Morgenthau Secretary of the Treasury By serving E H Foley, General Counsel

PERSONALLY 10-31-39

Marshal's Fees: Service \$2.-

JOHN B. COLPOYS
United States Marshal.

By A. P. HARE, K
Deputy United States Marshal.

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

373 Filed Feb 6 1940 Charles E. Stewart, Clerk

District Court of the United States for the
District of Columbia

Civil Action File No. 4598

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation with an office and place of business at 100 Broadway, in the City, County and State of New York,
Plaintiff,

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
Intervener-Plaintiff,

—against

CORDELL HULL, Secretary of State, and
HENRY MORGENTHAU, Secretary of Treasury,
Defendants.

LEHIGH VALLEY RAILROAD COMPANY, *Intervener-Defendant.*

DISTRICT OF COLUMBIA, ss.:

John F. Condon, Jr., being duly sworn, deposes and says:
I annex hereto copies of the record in the office of the United States Marshal for the District of Columbia of the

332 Z. & F. ASSETS REALIZATION CORP. ET AL. VS. HULL ET AL.

service of the summons and complaint herein upon the defendants.

I also annex hereto a copy of one of the alleged certificates certifying some of the awards to the Treasury.

JOHN F. CONDON, JR.

Sworn to before me this 6th day of February, 1940.

GRACE C. INGELS,
Notary Public, D. C.

My Com. expires June 15, 1941

(Seal)

374

Form No. 247

Civil No. 4598

Crim'l No.

Marshal's No.

Writ

Z. & F. ASSETS REALIZATION CORP.

VS.

CORDELL HULL-HENRY MORGENTHAU

Oct 31.39 P. Henry Morgenthau Sec'y of Treas. Sum
by serving Mr. E. H. Foley Comp.
Gen'l Counsel 9:25 A M

Car tickets A. P. Hare Deputy \$1—

375

Form No. 247

Civil No. C A

Crim'l No.

Marshal's No: 4598

Writ

Z. & F. ASSETS REALIZATION CORP.

VS.

CORDELL HULL et al.

10-31-39 P. Cordell Hull Sec'y of State Sum
by serving Green H. Hackworth Comp
Legal Advisor

Car tickets. A. P. Hare, Deputy \$1—

Time 3:15 P M

376 I hereby certify to the Secretary of the Treasury in accordance with the provisions of Section 2 (a) of the Settlement of War Claims Act of 1928, approved by the President on March 10, 1928, the tenth alphabetical list of awards dated October 30, 1939, entered by the Mixed Claims Commission, United States and Germany, in respect of claims decided by the Commission under the Agreement of August 10, 1922, between the United States and Germany, the awards included therein being more particularly described in the certified copies of the awards accompanying this certificate.

In Witness Whereof, I, Cordell Hull, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and hereunto subscribe my name at the City of Washington this 31st day of October, 1939.

CORDELL HULL,
Secretary of State.

Endorsed: United States Court of Appeals for the District of Columbia Filed Feb 9—1940 Joseph W. Stewart, Clerk

Endorsed: Filed Feb 9 1940 Charles E. Stewart, Clerk
District Court of the United States for the District of
Columbia

Civil Action No. 4598

Z. & F. ASSETS, ETC. CO. ET AL. *Plaintiff,*

v.

HULL, ET AL. *Defendants.*

A final judgment was entered in this cause on January 6, 1940. On the same date both the plaintiff and the intervening plaintiff filed notices of appeal, and on January 10, 1940, each filed a bond for costs on appeal.

On January 18, 1940, after the notices of appeal and the filing of the cost bond and more than ten days after the date of the final judgment, the plaintiff filed a motion for a reargument, for a vacation of the final judgment, and upon reargument for a reversal of the action of the court, or, in the alternative, for an order correcting the opinion of the court heretofore filed.

In my opinion the court has no power to entertain a motion of this character after the appeal has been perfected as it was in this case both by notice of appeal and by filing of an appeal bond. *Lasier v. Lasier*, 47 App. D. C. 80; *Furman v. Marsh*, 49 App. D. C. 125. Nor was the motion filed within the ten days fixed by the Federal Rules of Civil Procedure, Rule 73 (a).

However, had I the power to do so, I think the opinion should be modified by inserting the words "after the filing of the complaint, but before service of the summons or complaint upon the Secretary of State, the Secretary of State had certified to the Secretary of the Treasury the award of the Commission in favor of the intervener", in lieu of the words "Before the filing of the complaint, the Secretary of State had already certified to the Secretary of the Treasury the award of the Commission in favor of the intervener". This error in the opinion was due to inadvertence and a misunderstanding of what was apparently a conceded fact.

The motion should be overruled.

BAILEY, J.

A True Copy

Test:

CHARLES E. STEWART, *Clerk*

By K. M. HARVEY

Asst. Clerk

(Seal)

[fol. 335]

Wednesday, March 27th, A. D. 1940.

No. 7596

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; American-Hawaiian Steamship Company, Intervener, Appellants,

vs.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of Treasury; Lehigh Valley Railroad Company, Intervener

Mr. Frank Roberson introduced Mr. Joseph M. Proskauer to the Court with the request that he be permitted to argue, which request the Court granted.

The argument in the above entitled cause was commenced by Mr. Joseph M. Proskauer, attorney for Appellant Z. & F. Assets Realization Corporation, continued by Messrs. Fred K. Nielsen, attorney for Intervener-Appellant American-Hawaiian Steamship Company; Francis M. Shea, attorney for Appellees Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of Treasury; William D. Mitchell, attorney for Intervener-Appellee Lehigh Valley Railroad Company, and concluded by Mr. Joseph M. Proskauer, attorney for Appellant Z. & F. Assets Realization Corporation.

[fol. 336] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7596

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; American-Hawaiian Steamship Company, Intervener, Appellants,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of Treasury; Lehigh Valley Railroad Company, Intervener

Appeal from the District Court of the United States for the District of Columbia

Decided June 3, 1940

Fred K. Nielsen and Frank Roberson, both of Washington, D. C., and Joseph M. Proskauer, of New York, New York, for appellants.

Francis M. Shea, Francis J. McNamara, and Frank C. Sterck, all of Washington, D. C., for appellees.

Richard H. Wilmer and Douglas L. Hatch, both of Washington, D. C., and William D. Mitchell, of New York, New York, for intervenor.

Before Miller, Vinson and Rutledge, Associate Justices,

MILLER, Associate Justice:

The war between the United States and Germany was ended by a Joint Resolution of Congress on July 2, 1921;¹ which reserved to the United States and to its nationals all rights, privileges, indemnities, reparations, and advantages to which they became entitled by the Treaty of Versailles.² The resolution specified that all property of the Imperial German Government, or its successor, and of all German nationals, which was under the control of the United States, should be retained by the latter until suitable provision had been made for the satisfaction of all claims of United States citizens against Germany arising out of, or in consequence of, the war, or otherwise. Thereafter, on August 25, 1921, a treaty of peace was entered into, at Berlin, between the United States and Germany,³ securing to the United States the rights reserved to them in the Joint Resolution of July 2d, including all rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles. This treaty was proclaimed [fol. 337] by the President on November 14, 1921.⁴ On August 10, 1922, an executive agreement was signed at Berlin,⁵ which provided for the creation of a Mixed Com-

¹ 42 Stat. 105.

² Signed at Versailles June 28, 1919, and effective January 10, 1920. Sen. Doc. No. 348, 67th Cong., 4th Sess. (1923) 3329.

³ U. S. Treaty Ser. No. 658; 42 Stat. 1939; Sen. Doc. No. 348, 6th Cong., 4th Sess. (1923) 2596.

⁴ 42 Stat. 1939; Sen. Doc. No. 348, 67th Cong., 4th Sess. (1923) 2600.

⁵ U. S. Treaty Ser. No. 665; 42 Stat. 2200; Sen. Doc. No. 348, 67th Cong., 4th Sess. (1923) 2601.

mission "to Determine the Amount to be Paid by Germany in Satisfaction of Germany's Financial Obligations Under the Treaty" of August 25, 1921. The executive agreement provides for a commission of three members, one commissioner to be appointed by each of the two governments, and an umpire to be selected by agreement of the two governments, who is charged with the duty of deciding "upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings." The executive agreement provides further, in Article II, that in case the umpire or any of the commissioners shall die or retire, or be unable for any reason to discharge his duties, the same procedure shall be followed in filling the vacancy "as was followed in appointing him;" in Article IV, that the Commission may appoint and employ other necessary officers; that the commissioners shall keep minutes of their proceedings and an accurate record of the questions and cases submitted to them; in Article VI, that "The two Governments may designate agents and counsel who may present oral or written arguments to the commission;" that the Commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective governments in support of or in answer to any claim; and that "The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments."

"Article I. The commission shall pass upon the following categories of claims which are more particularly defined in the treaty of August 25, 1921, and in the treaty of Versailles: (1) Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of, their property, rights, and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914; (2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons or to property, rights, and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war; (3) Debts owing to American citizens by the German Government or by German nationals."

On March 10, 1928, Congress enacted the Settlement of War Claims Act,⁷ which directed the Secretary of State to certify the awards of the Mixed Claims Commission to the Secretary of the Treasury, who, in turn, was required to pay the awards so certified, according to specified priorities, out of a German special deposit account thereby created.^{7a}

Pursuant to the executive agreement, the Commission was created, and an American Commissioner, a German Commissioner, and an Umpire were appointed. In 1927, there were filed with the Commission, by the agent for the United States, claims arising out of the destruction of property by reason of explosions, in 1916, at Black Tom, in New York Harbor, and at Kingsland, New Jersey, in 1917. On October 16, 1930, the Commission found that Germany was not responsible for the explosions and refused to allow the claims.

Petitions for rehearing of the Commission's order dismissing the claims were denied on March 30, 1931. On July 1st of that year a supplemental petition in the two cases was filed, together with new evidence; this was dismissed on December 3, 1932. A new petition was filed on May 4, 1933, to reopen the cases, for the reason, then for the first time alleged, that the decisions of 1930 and 1932 had been obtained by fraud and collusion. Conflicting opinions were expressed by the two commissioners as to the power of the Commission to entertain and consider petitions for rehearings. On December 15, 1933, the Umpire, Justice Owen D. Roberts, held that it had power to reopen the cases and either confirm the decisions theretofore made, or alter them as justice and right might require. Following that decision additional evidence was filed by the agents of both governments and argument was had before the Commission upon the question of the power of the Commission. On June 3, 1936, the Commission unanimously set aside its decision of December 3, 1932.

After an interval of a year, occasioned by Germany's request for postponement, witnesses were examined; additional evidence was filed by the agents of both governments; and, in January 1939, the cases were again argued at length.

⁷ 45 Stat. 254.

^{7a} Sections 2(a)(b), 4.

before the full Commission. The American agent again requested that the cases be reopened and that the Commission render a final decision on the merits in favor of the United States. On January 27th, the hearings and arguments being concluded, the Commission took the case under advisement. In the deliberations of the Commission which followed, the Umpire and the American Commissioner each expressed the view that the Commission's decision of October 16, 1930, had been induced by fraud in the evidence presented by Germany. Thereupon, at the specific request of the German Commissioner, the Commission proceeded to determine whether, upon the whole record, there was sufficient proof of Germany's responsibility to justify setting aside the prior decision. On March 1, 1939, and during the course of the Commission's deliberation upon that question, the German Commissioner retired as a member of the Commission.

Thereafter, personal notice was given to the German agent of a further meeting of the Commission to be held on June 15, 1939. Following this notice, and prior to the date of the meeting, Germany stated, through announcements made both by its agent and its diplomatic representative, that it would ignore the meeting called. These representations and announcements were made a part of the record. On the day of the meeting, the Commission rendered a decision, setting aside its earlier decision of October 16, 1930, and reopening the cases. The American agent again moved that awards be granted in favor of the United States. The motion was granted and the Commission found that the liability of Germany, in both the Black Tom and Kingsland cases, had been established. It was ordered that awards be prepared and submitted to the Commission for its consideration at a further meeting to be held on notice.

Prior to October 30, 1939, personal notice was given to the German agent of a meeting of the Commission to be held on [fol. 339] that date. At that time a thorough study was made by the Commission—absent the German Commissioner—of the records and proofs on file, and awards were made in favor of the United States in each of the 153 claims which are involved in this case.

Appellants, who were plaintiff and intervener-plaintiff in the court below, are beneficiaries under prior awards made

by the Commission. They sought identical relief, i.e., for a judgment declaring:

(a) That the decision of the Mixed Claims Commission of October 16, 1930, is final and binding and that all proceedings purported to be had by said Commission or the aforesaid alleged Commission thereafter are null and void;

(b) That the said awards granted to the said Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others, be declared null and void;

(c) That the defendant, Cordell Hull, Secretary of State of the United States, be enjoined and restrained from certifying to the Secretary of the Treasury any and all alleged awards to claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others;

(d) That the Secretary of the Treasury be restrained and enjoined from paying the amount of any awards to the said claimants, Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Company, Limited, Bethlehem Steel Company, and others;

(e) That the said Cordell Hull and the said Henry Morgenthau be restrained therefrom during the pendency of this action.

(f) That the Secretary of the Treasury be directed to pay to the plaintiff and other holders of awards of the Mixed Claims Commission, other than the said sabotage claimants, the balance remaining in the German Special Deposit Account to the extent provided for in the Settlement of War Claims Act of 1928.

(g) That the plaintiff be awarded the costs and disbursements of this action and such other and further relief in the premises as to the Court may seem proper.

The appellees, Hull and Morgenthau, moved to dismiss both the complaint and the bill of intervention upon the grounds that the lower court was without jurisdiction to review the action of the Mixed Claims Commission; to determine whether or not the Commission had jurisdiction to enter the awards of October 30, 1939; or to restrain and enjoin

appellees Hull and Morgenthau from certifying and paying such awards. Appellee Lehigh Valley Railroad Company filed an answer, and also filed a motion for summary judgment dismissing the complaint and the bill of intervention. The court granted both the motion to dismiss the complaint, and the motion for summary judgment, and on January 6, 1940, entered judgment thereon. This appeal is from the order and judgment.⁸

[fol. 340] Appellants contend here, as they contended below, that (1) the Mixed Claims Commission was without jurisdiction to make the awards of October 30, 1939; (2) if payment is made, by the Secretary of the Treasury, of the amounts specified in the awards of October 30, 1939, it will exhaust the Special Deposit Fund, which is held by the Secretary of the Treasury for the payment of awards made by the Mixed Claims Commission;⁹ and (3) thus they will be prevented from receiving payment of amounts to which they are entitled under the prior awards.

Whatever may be the merits of the second and third contentions, the lower court was barred from giving consideration to them; for they, in turn, depend upon the first contention and, as it involves a political and not a judicial question, the court was without jurisdiction to hear or decide it.¹⁰

It would be difficult to draw a clear line of demarcation between political and non-political questions,¹¹ and it is un-

⁸ Appellee Lehigh Valley Railroad Company also filed a cross-claim against appellee Morgenthau. This was not considered by the court below and is still pending there.

⁹ 45 Stat. 254, 260.

¹⁰ See generally, Field, *The Doctrine of Political Questions in the Federal Court*, 8 Minn. L. Rev. 485; Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338; Weston, *Political Questions*, 38 Harv. L. Rev. 296, 299: "A 'political' question, accordingly, will be one which is by law for the determination of the executive or legislative departments, or possibly of the people themselves."

¹¹ Weston, *Political Question*, 38 Harv. L. Rev. 296, 300: "To mention and contest judicial action and political action, for example, raises at once a fairly definite notion of the essentials of either viewed in the abstract; and yet this becomes a troublesome affair when exact definition is

necessary to do so for the purposes of this decision. In *Sevilla v. Elizalde*,¹² Justice Stephens, speaking for this court, has recently discussed the general criteria which determine whether or not a case presents a political or judicial question. Among the questions which have been recognized as political rather than judicial in nature, none comes more clearly within the former classification than those which involve the propriety of acts done in the conduct of the foreign relations of our government.¹³ As the decision of international questions may involve the friendly relations of nations, they must be dealt with by those departments which have the power to adjust them by negotiation, and, if necessary, to enforce the rights involved by other forms or devices of diplomacy. It has been the policy of the judiciary to follow the action of the political departments on such matters and to disclaim power to interfere.¹⁴ As

attempted, and still more troublesome when an endeavor is made to allot powers to the departments of government solely as a matter of deduction from such definitions."

¹² (No. 7323, decided April 15, 1940) — App. D. C. —, — F. (2d) —.

¹³ In *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302, it was held that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." See also, *Wilson v. Shaw*, 204 U. S. 24, 32; *Lehigh Valley R. R. v. Russia*, 2 Cir., 21 F. (2d) 396, 399-400, cert. denied, 275 U. S. 571; Jaffe, *Judicial Aspects of Foreign Relations* (1933) 38; Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 347: "Perhaps the only class of cases which courts have unanimously agreed to refrain from interfering with, is that great group of matters involving foreign relations of the United States with other nations."

¹⁴ *United States v. Lee*, 106 U. S. 196, 209. Courts will not inquire into the power of a foreign government to enter into a treaty with the United States, the determination of the political branch being conclusive. *Doe ex dem. Clark v. Braden*, 16 How. [U. S.] 635. The same judicial limitation

[fol. 341] "The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided",¹⁵ it follows that the courts

was applied to an attack upon an Indian treaty. *Fellows v. Blacksmith*, 19 How. [U. S.] 366, 372. Whether a foreign state has power to carry out its treaty obligations is, likewise, political. *Terlinden v. Ames*, 184 U. S. 270, 288.

¹⁵ Marshall, Ch. J., in *Foster v. Neilson*, 2 Pet. [U. S.] 253, 307; Jaffe, *Judicial Aspects of Foreign Relations* (1933) 51: "It is the general rule that courts will not decide cases against foreign states or sovereigns without their consent, and that in addition certain property, persons, and acts appertaining to sovereign states are withdrawn from the jurisdiction of the courts. This does not mean that a foreign state can commit no wrong, but that the controversy is more properly settled by diplomacy, or international courts or war."

"The President of the United States is intrusted with the right of conducting all negotiations with foreign governments and is the judge of the expediency of instituting, conducting, or terminating such negotiations in respect to claims against foreign governments." *Russia v. National City Bank of New York*, 2 Cir., 69 F. (2d) 44, 48. See *United States ex. rel. Holzendorf v. Hay*, 20 App. D. C. 576, writ of error dismissed, 194 U. S. 373. This was established at an early date in our constitutional history. In 1800, Marshall, addressing the House of Representatives, said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 *Annals of Congress*, 6th Cong., 1st sess. col. 613. In 1803, as Chief Justice of the United States, he said: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nations, not

should do no act which, directly or indirectly, would embarrass the government in conducting its international affairs.¹⁶ "If this were not the rule, cases might often arise, [fol. 342] in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference

individual rights, and, being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts." *Marbury v. Madison*, 1 Cranch [U. S.] 137, 165. See *United States ex rel. Holzendorf v. Hay*, *supra* at 580.

In 1816, the Senate Committee on Foreign Relations reported: "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospects of success. For his conduct he is responsible to the Constitution." Sen. Doc. No. 231, 56th Cong., 2d Sess. (1901) 24. And even though the Senate must ratify treaties in the field of negotiation that body cannot intrude, and Congress itself is powerless to invade it. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 319.

¹⁶ *Deutsche Bank und Disconto-Gesellschaft v. Cummings*, 65 App. D. C. 297, 305, 83 F. (2d) 554, 562, *rev'd* on other grounds, 300 U. S. 115. See Potter, The "Political Question" in International Law in the Courts of the United States, 8 S. W. Pol. & Soc. Sci. Q. 127; *United States v. Lee*, 106 U. S. 196, 209; "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."; *George E. Warren Corp. v. United States*, 2 Cir., 94 F. (2d) 597, 599, *cert. denied*, 304 U. S. 572.

For a discussion of rationalizations of the "political" question doctrine, see Clulow et al., *Constitutional Objections to the Appointment of a Member of a Legislature to Judicial Office*, 6 Geo. Wash. L. Rev. 46, at 59 et seq., particularly notes 67-69.

between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character."¹⁷

Plaintiff-appellant, in attempting to maintain the jurisdiction of this court, and of the lower court, to determine the validity of the awards made by the Commission, relies upon Article III, Section 2, Clause 1 of the Constitution, which provides: "The judicial Power shall extend to, all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." But this argument fails to take account of the rule just stated, concerning political questions. It is of course elementary that treaties, together with the Constitution and laws made in pursuance thereof, constitute the supreme law of the land.¹⁸ And it is true that the courts, in the exercise of their judicial functions, must interpret and apply such treaties.¹⁹ But it is equally true that the judicial function extends only to justiciable cases and controversies.²⁰ By giving to the courts " 'judicial Power' the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. . . . Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'cases' or 'controversies.' It was not for courts to

¹⁷ Williams v. Suffolk Ins. Co., 13 Pet. [U. S.] 415, 420.

¹⁸ U. S. Const. Art. VI, cl. 2.

¹⁹ Crandall, *Treaties: Their Making and Enforcement* (2d ed. 1916) 160-161: "Although a treaty is primarily a contract between nations it operates by virtue of Article VI of the Constitution as a municipal law and so far as it prescribes a rule by which rights of individuals under it may be determined the courts look to the treaty as they would to a statute for a rule of decision."

²⁰ Muskrat v. United States, 219 U. S. 346, 357.

meddle with matters that required no subtlety to be identified as political issues." ²¹

Thus, when the alleged controversies arising out of treaty relationships are political in nature they are not cases within the meaning of Article III of the Constitution and, consequently, are not subject to judicial determination. The distinction was clearly stated by the Supreme Court in the *Head Money Cases*: ²²

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions [for 343] on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations, residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

And in *Foster v. Neilson*,²³ Chief Justice Marshall said:

²¹ Opinion of Justice Frankfurter in *Coleman v. Miller*, 307 U. S. 433, 460.

²² 112 U. S. 580, 598-599.

²³ 2 Pet. [U. S.] 253, 314.

"Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; . . ."

Since the case of *Ware v. Hylton*,²⁴ decided by the Supreme Court in 1796, the courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature²⁵ or the executive,²⁶ and, accordingly, have consistently declined jurisdiction of such matters. As one court said recently: "Obviously, it would not do for the courts to declare that an act is a breach of a treaty and results in this or that remedy. The remedy accorded might not content the foreign power or might bring about a conflict between [fol. 344] the executive and judicial branches of our own government."²⁷

²⁴ 3 Dall. [U. S.] 199, 260.

²⁵ *Whitney v. Robertson*, 124 U. S. 190, 194-195; *Botiller v. Dominguez*, 130 U. S. 238, 247, citing *The Cherokee Tobacco*, 11 Wall. [U. S.] 616 and *Taylor v. Morton*, 2 Curt. 454.

²⁶ *George E. Warren Corp. v. United States*, 2 Cir., 94 F. (2d) 597, 599, cert. denied, 304 U. S. 572.

²⁷ *Ibid.* See *Charlton v. Kelly*, 229 U. S. 447, 474, quoting John Bassett Moore, *International Law Digest*, Vol. 5, page 566, to the effect that the enforcement of a treaty depends on the honor and the interests of the governments which are parties to it. "If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

It is significant that questions arising under treaties and agreements have been submitted, from an early date, to the political branch of the government. Thus, Crandall, in his work on *Treaties: Their Making and Enforcement* (2d ed. 1916) 369-370, cites the following instances: "Under the Articles of Confederation, the Secretary for Foreign Affairs found it advisable to submit questions arising in the con-

The situation is the same as it relates to executive agreements.²⁸ Just as the power of negotiating and executing the provisions of treaties between the United States and foreign countries resides exclusively in the political departments of the government, equally so should the power to negotiate

struction of treaties to the Congress. Under the Constitution, the Senate, a co-ordinate branch of the treaty-making power, has been consulted by the President upon such questions only in exceptional instances. On representations by the French government that certain acts of Congress, which imposed extra tonnage dues on foreign vessels and made no exception in favor of French vessels, contravened the fifth article of the treaty of 1778, President Washington submitted the question to the Senate for its consideration. The Senate advised as to the meaning of the article in a resolution adopted February 26, 1791. The Executive likewise submitted for the consideration of the Senate the question that arose in 1868 between this government and the Ottoman Porte as to the correct version of Article IV of the treaty of May 7, 1830, concerning the territorial exemption to be enjoyed by American citizens in Turkey. Instances are also to be found of the submission by the President to the Senate of awards of international commissions for its advice as to whether the commissioners have acted within their powers, i. e. interpreted correctly the convention under which they were appointed. The award of the commissioners, under the claims convention with Paraguay of February 4, 1859, was, for instance, communicated to the Senate for this purpose by President Buchanan, February 12, 1861. In the case of the recommendatory award of the King of the Netherlands, as arbitrator under the convention with Great Britain of September 29, 1827, for the determination of the northeastern boundary, the Senate, to which the question was submitted by President Jackson, advised that the award was not obligatory; and it was not so considered."

²⁸ In international law, the term treaty signifies a compact between two or more independent nations with a view to the public welfare. Dickinson, *The Law of Nations* (1st ed. 1929) 1016, quoting 1 Oppenheim, *International Law* (3d ed. 1920) § 508 and Hall, *International Law* (8th ed. 1924) 384. See Moore, *Treaties and Executive Agreements*, 20 *Pol. Sci. Q.* 385. Compacts which have for their object

and execute such agreements.²⁹ The purpose of the Treaty of Berlin was that further negotiations should be carried on between the signatories for the determination and settlement of outstanding claims. The executive agreement was in furtherance of this purpose. Under such circumstances there is no reason or excuse for judicial interference. Such [fol. 345] interference could result only in embarrassment to the political arm of the government in its conduct of the international affairs of the nation.

This is none the less true when the treaty or executive agreement provides, as was done in the present case, for a commission to settle the amounts of claims of citizens of the United States against the government of another nation. The compact is between the two governments; the citizens are not parties thereto;³⁰ and no provision is made or contemplated therein, for submitting any question to the courts. Paraphrasing the language of the Supreme Court in *La Abra Silver Mining Co. v. United States*,³¹ the money in the hands of the Secretary of the Treasury in this case was paid to the United States by Germany subject to the awards of the Commission. That tribunal dealt only with the two gov-

temporary matters and which have been called agreements, conventions, pactions, protocol, *modus vivendi*, are essentially international treaties. See *United States v. Belmont*, 301 U. S. 324; *B. Altman & Co. v. United States*, 224 U. S. 583, 600; *Holmes v. Jennison*, 14 Pet. [U. S.] 540, 572. See also, Miller, *Some Legal Aspects of the Visit of President Wilson to Paris*, 36 Harv. L. Rev. 51, 63; Barnett, *International Agreements Without the Advice and Consent of the Senate*, 15 Yale L. J. 18, 63.

²⁹ See *United States v. Belmont*, 301 U. S. 324, 330.

³⁰ *Frelinghuysen v. Key*, 110 U. S. 63, 71, 72; *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 458; *United States v. Diekelman*, 92 U. S. 520, 524; *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 376, 138 N. E. 24, 26. See *United States ex rel. Holzendorf v. Hay*, 20 App. D. C. 576, 580, writ of error dismissed, 194 U. S. 373: "The duty of righting the wrong that may be done to our citizens in foreign lands is a political one, and appertains to the executive * * *."

³¹ 175 U. S. 423, 458.

ernments, had no relations with claimants, and could take cognizance only of claims presented by or through the respective governments. No claimant, individual or corporate, was entitled to present any demand or proofs directly to the Commission. No evidence could be considered except such as was furnished by or on behalf of the respective governments. While the claims of individual citizens presented by their respective governments were to be considered by the Commission in determining amounts, the whole purpose of the agreement was to ascertain how much was due from one government to the other on account of the demands of their respective citizens. Each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection, so far as possible, against frauds and impositions by the individual claimants. As between the United States and Germany, indeed as between the United States and American claimants, the money received from Germany was in strict law the property of the United States, and no claimant could assert or enforce any interest in it so long as the government legally withheld it from distribution.³² And it was expressly agreed that any award made should be, as between the two governments, final and conclusive until set aside by agreement between them.³³

Although an individual claimant may have a moral right to participate in an award, as a matter of strict legal or equitable right he has none, and Congress is under no legal or equitable obligation to pay any claim.³⁴ Therefore, it is only when such a claimant has been permitted by Congress to participate in such an award that he has any standing to invoke judicial relief. Then, and only then, may he invoke the jurisdiction of the court to determine questions involving ownership, or apportionment between claimants of the [fol. 346] amounts awarded.³⁵ *Mellon v. Grinoco Iron*

³² *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 458.

³³ *Frelinghuysen v. Key*, 110 U. S. 63, 72.

³⁴ *Williams v. Heard*, 140 U. S. 529, 537; *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 323. See *United States v. Weld*, 127 U. S. 51, 55-57.

³⁵ Cf. *Comegys v. Vasse*, 1 Pet. [U. S.] 193, 212; *Judson v. Corcoran*, 17 How. [U. S.] 612; *Frevall v. Bache*, 14 Pet. [U. S.] 95. Cf. also, *Williams v. Heard*, 140 U. S. 529, 539.

Co.,³⁶ relied upon by appellants, is distinguishable on this ground. The sole issue in that case was the ownership of a specific fund received by the United States from Venezuela.³⁷ The validity of the award was not challenged. Obviously, a judicial determination of ownership or apportionment of the amount of an award must proceed upon the assumption that the award is valid. This being true, in such a case the international aspects of the dispute, which preceded the making of the award, are no longer involved; the controversy of which the court takes jurisdiction is a domestic one; consequently, there is—to the extent of the award—no longer a question in which a foreign government can have a legitimate interest; a fortiori there is no longer a political question; and no longer any obstacle to judicial action on that ground.

The present case, clearly, is not one of a domestic, non-political character. Appellants challenge the power and authority of the international Commission, attack the validity of its awards and seek to deny them effect. This is clearly revealed by the allegations of the complaint, as well as by the prayers for relief. While in paragraphs 8 and 9 it is alleged that "the said Commission thereupon duly granted five awards in favor of the said plaintiff," and, further, that other "numerous claimants * * * were duly granted awards by the said Commission * * *;" the rest of the complaint (paragraphs 11 to 31, inclusive) is devoted to challenging the existence, authority and actions of the Commission, the validity of the later awards, and the legality of the procedure which was followed.

In fact, the situation of the present case is clearly one of a continuing controversy between the United States and Germany although, paradoxically, neither government is a party to the present suit. Germany bound herself to pay to the United States, in full, awards made by the Mixed Claims Commission here involved. The fund established in the Treasury, and which is sought to be controlled in the present case, was set up for the purpose of paying awards thereafter to be made. To it Germany made substantial contributions. Into it were deposited amounts seized from German nationals, as well as property belonging to the Ger-

³⁶ 266 U. S. 121.

³⁷ See *Smith v. Harrah*, 60 App. D. C. 258, 51 F. (2d) 314.

insufficient to pay all awards, the German Government is solemnly bound to supply additional funds necessary for that purpose, and has provided bonds to guarantee such payment. In consideration of Germany's obligation above recited, the United States returned to German nationals eighty per cent of the funds and property seized by the government and originally held for the purpose of satisfying these claims.

The continuing interest of Germany in the controversy cannot well be denied. (1) If appellants are correct in their man Government. If the amount of the fund shall be found contention that the retirement of the German Commissioner blocked further action by the Mixed Claims Commission,³⁸ then—as to all undecided matters — presumably the two [fol. 347] countries were right back where they were before the Commission was appointed. (2) If appellants' contention is correct that awards were improperly made then perhaps Germany was not liable for the amount thereof, while if they were properly made presumably she was liable. (3) If it is true, as appellants contend, that the Commission acted outside the scope of its authority then perhaps it acted in an area which the executive agreement did not cover; hence, in an area coverable only by a treaty negotiated, or to be negotiated, by the political departments of the government.

If there were any doubt as to the continuing interest of Germany in the proceedings, or of the political nature of the controversy, it would be dispelled by a reading of the acrimonious protest which was filed following the retirement of the German Commissioner, by the German Chargé d'Affairs ad interim, with the Secretary of State. This protest spoke disparagingly of the American Umpire; referred to the Mixed Claims Commission as "the rump Commission;" claimed that it "was incompetent to make a decision;" that any awards made by it were void; referred to the proceedings of the Commission as "a litigation between two sovereign Governments, in which the uninvestigated claims amount to approximately \$40,000,000!;" stated that the "approval of claims of *Canadian* interested parties in a procedure which the German Government and the United States Government have established for the settlement of

³⁸ Cf. *Colombia v. Cauca Co.*, 190 U. S. 524, 528.

claims of *American* citizens is null and void;" and "To sum up . . . that the 'decision' of the American Umpire, which contemplates the issuance of awards, was issued in disregard and violation of essential provisions of the statute of the Commission, essential agreements between the German Government and the United States Government, essential rules of procedure and binding decisions of the full Commission, the observance of which would have been the absolute duty of the American Umpire." The communication concluded with the expression of hope "that the United States Government does not approve of the violations of procedure discussed in this note and that it will find some way of quashing them, in order to restore, in collaboration with the German Government, the basis existing before the beginning of these violations of procedure, upon which the proceedings can be brought to a conclusion in an orderly way."

To these protests and accusations the Secretary of State replied: "I have entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite your severe and, I believe, entirely unwarranted criticisms, and I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion." It requires no more than a recital of these exchanges between the governments of Germany and the United States to show that they bring the case clearly within the realm of political as distinguished from judicial questions.

[fol. 348] The present case is clearly distinguishable, also, from the case of *Colombia v. Cauca Co.*,³⁹ relied upon by appellants, in which a foreign government voluntarily submitted to an arbitration between itself and a private citizen of the United States and, thereafter, voluntarily submitted itself to the jurisdiction of a federal court to secure the determination of a controversy between itself and that private citizen, which arose out of the arbitration proceeding.⁴⁰

³⁹ 190 U. S. 524.

⁴⁰ Cf. *United States v. Diekelman*, 92 U. S. 520, 524.

In view of our determination, as set forth above, it is not necessary to consider any of the other assignments or questions presented.

Affirmed.

[fol. 349] Monday, June 3rd, A. D. 1940

No. 7596, April Term, 1940

Z. & F. ASSETS REALIZATION CORPORATION &C., et al., Appel-
lants,
vs.

CORDELL HULL, Secretary of State, et al.

Appeal from the District Court of the United States for the District of Columbia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

Per Mr. Justice Miller, June 3, 1940.

[fol. 350] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 22, 1940. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA, JANUARY TERM, 1940

No. 7596

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation, Plaintiff-Appellant, AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener-Plaintiff-Appellant,
against

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of Treasury, Defendants-Appellees, LEHIGH VALLEY RAILROAD COMPANY, Intervener-Defendant-Appellee.

DESIGNATION OF RECORD

The clerk in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. Printed record;
2. Minute entry of argument;
3. Opinion;
4. Decree;
5. This designation of record;
6. Clerk's certificate.

Frank Roberson, Hubert E. Rogers, John F. Condon,
Jr., Attorneys for Plaintiff-Appellant.

[fol. 351] UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 350, inclusive, constitute a true and correct copy of the transcript of record and proceedings, as designated by counsel for the plaintiff-appellant, in the case of Z. & F. Assets Realization Corporation, a Delaware corporation; American-Hawaiian Steamship Company, Intervener, Appellants, vs. Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of Treasury; Lehigh Valley Railroad Company, Intervener, No. 7596, April Term, 1940, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 23rd day of August, A. D. 1940.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. By: C. Newell Atkinson, Deputy Clerk. (Seal.)

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[fol. 352] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1940

No. 381

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration and decision of this application.

[fol. 353] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1940

No. 382

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration and decision of this application.

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AUG 29 1940

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 381

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA AND
BRIEF THEREON.**

**FRANK ROBERSON,
HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
*Solicitors for Petitioner, Z. & F.
Assets Realization Corporation.***

**JOHN BASSETT MOORE,
JOSEPH M. PROSKAUER,
*Of Counsel.***

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Supreme Court of the United States

OCTOBER TERM, 1940.

No.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The petition of Z. & F. Assets Realization Corporation respectfully shows to this Honorable Court:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

That the petitioners were plaintiffs in a suit in equity, brought in the Supreme Court of the District of Columbia, asking for a declaratory judgment that certain Sabotage Claimants, including intervener-defendant, were not entitled to share in a Special Deposit Fund created by the Settlement of War Claims Act of 1928, which set aside specific funds in a limited amount for the payment of

awards made by the Mixed Claims Commission established by the United States and Germany under the agreement concluded on August 10, 1922 (see Appendix), pursuant to the Treaty of Berlin of August 25, 1921 (42 Stat. 1939).

That on the 6th day of January, 1940 (R. 298) there was entered a decree granting the motion of intervener-defendant to dismiss the bill of complaint and the bill of intervention of the plaintiff-intervener, and that this judgment was on the 3rd day of June, 1940, affirmed by the United States Court of Appeals for the District of Columbia.

That by the terms of the Agreement of August 10, 1922, (Article II), the Commission consisted of two Commissioners, one appointed by each Government, and, for the decision of any cases or points on which the Commissioners disagreed, the two Governments were to select an Umpire, and it was stipulated (Article VI) that "the decisions of the Commission and those of the Umpire (in case there may be any) shall be final and binding upon the two Governments". The two Governments chose as Umpire, a citizen of the United States. By the rules of the Commission, the Umpire had power to act solely in the event that both Commissioners certified to him, in writing, their disagreement.

That the alleged awards now in question, having been made by the American Commissioner and the Umpire after the German Commissioner had retired, are not awards within the meaning of the Settlement of War Claims Act of 1928, the Treaty of Berlin of 1921, and the Agreement of 1922, (1) because the sole question before the Commission prior to the retirement of the German Commissioner was whether the previous decision of the Commission dismissing the claims should be set aside and the claims reheard; (2) because no conclusion on that question had been reached and recorded; (3) because the American Commissioner and the Umpire, even if they had been entitled thereafter to function as the "mixed commission," which, by the express terms of the Agreement of 1922, consisted

of a Commissioner appointed by each Government, could not have made an award without an actual rehearing.

That the petitioners, and others similarly situated, are holders of awards granted long prior to June 15, 1939, and in most cases prior to the passage of the Settlement of War Claims Act of 1928 (R. 3). This action is brought by petitioner in behalf of itself and all other American holders of awards granted prior to June 15, 1939.

That the five awards to petitioner, with interest to January 1, 1928, aggregate the sum of \$1,175,918.78, on account of which petitioner has received the sum of \$864,048.31, leaving a balance unpaid of \$311,870.47, which with interest to January 15, 1936, makes a total aggregate unpaid balance of \$599,373.96 (R. 3).

That by contrast, the Sabotage Claims, on which the proffered awards of October 30, 1939, were made, were dismissed nine years before by the actual Commission, lawfully functioning, on October 16, 1930 (R. 224, 260). But, while the question now pending has in a sense an international aspect, it is in substance not a conflict between the United States and Germany but is a contest between adverse American claimants to share in a fund created by an act of Congress, which fund, is estimated to be \$24,000,000 (R. 28).

Petitioners deny that the Sabotage Claimants have, under the alleged awards of the American Commissioner (Hon. Christopher B. Garnett) and the Umpire (Hon. Owen J. Roberts), a right to share in the Special Deposit Fund, and this denial rests on the following grounds:

(1) The Mixed Commission was *functus officio* as to the Sabotage Claims after their dismissal on October 16, 1930.

(2) Although the question of the merits of the claims was specifically withheld from the Commission prior to the decision of the American Commissioner and the Umpire to grant a rehearing, no rehearing on the merits was thereafter held.

(3) The American Commissioner and the Umpire, while assuming as regarded the Sabotage Claims to act as the Mixed Commission, never gave notice to any representative of Germany that they intended to assess damages on the claims, although the Agents of the respective Governments had theretofore stipulated that such assessment would be postponed until after the determination of Germany's liability (R. 243).

(4) they purported to make an award in favor of a corporation whose stock was beneficially owned by persons who were not American nationals;

(5) they assumed to give judgment as a majority of a tribunal, composed of three Commissioners, although the agreement under which they professed to act provided for no such body;

(6) the Umpire assumed to make an award without having received a written certificate of disagreement, signed by both of the Commissioners, although under the rules of the Commission, he had no power to act without such a certificate;

(7) the United States Commissioner and the Umpire purported to act and claimed to have the power to act by virtue, as they alleged, of the wrongful resignation of the German Commissioner, although the 1922 agreement (Article II) expressly provided for the filling of vacancies caused either by death or by retirement, thus clearly implying that the *Mixed Claims Commission* could not function until such steps had been taken.

That pursuant to the provisions of the Treaty of Berlin and of the terms of the agreement annexed to the complaint, the Mixed Claims Commission was established to adjudicate the claims of American nationals.

That prior to 1930, the sabotage claimants filed numerous claims, including claims of Lehigh Valley Railroad Com-

pany, Bethlehem Steel Corporation and Agency of Canadian Car & Foundry Company, Ltd. (R. 82, 223). These claims were dismissed:

First, October 16, 1930, upon the original hearing (R. 224, 260).

Second, March 30, 1931, upon application for rehearing (R. 225). No evidence was filed with this application for rehearing.

Third, December 3, 1932, upon second application for rehearing (R. 225).

That the third petition for rehearing filed May 4, 1933, prayed for (R. 228):

"reopening and rehearing of the decisions in these claims; the United States reserving the right to complete the evidence", etc.

Thus, the sole relief asked for in said petition was "reopening and rehearing of the decisions in these claims" (R. 228).

That in 1935 the American Agent filed a motion for an order finally disposing of the claims on the merits, which motion was denied, Umpire Roberts saying, (R. 231):

"By the petition and answer an issue was framed.
* * * Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits" (R. 234).

That upon an argument had before the Commission on June 3, 1936 Umpire Roberts again reiterated that the pro-

ceedings before the Commission remained strictly limited to the issue of fraud, stating as follows (R. 232):

"Whether upon the showing made, the Commission should grant a rehearing, *unless Germany shall agree to a different course*, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate and distinct from any argument on the merits." (Italics ours.)

Germany never agreed to a different course (R. 233).

That in said opinion thus limiting the issue, one of the dismissal decisions was set aside, namely, the decision (December 3, 1932) that if new evidence were formally placed before the Commission and considered in connection with the whole body of evidence, the findings and conclusions then reached would not be reversed or materially modified (R. 232).

The fact is not disputed that this left the original dismissal of the Sabotage Claims, in 1930, in full force and effect, subject only to the motion then pending to *rehear* on the specific ground of fraud (R. 232).

That the request that the Commission decide the merits of the sabotage claims was again made by the American Agent in his brief filed on September 13, 1938, but the German Agent in his brief filed in answer thereto on November 16, 1938 refused to consent to the course of procedure requested (R. 233). The request was repeated on January 27, 1939, and was again refused (R. 235). All the circumstances are set forth in the answering affidavit (R. 233-235), and the fact is that consent was never given.

After extended argument in January 1939, the Commission met to deliberate on the application for a rehearing (R. 235); and during the deliberations the German Commissioner retired. It is claimed by the American Commissioner and Umpire, and by the defendant-intervener, that, when the German Commissioner retired, there had been a disagreement as to the points at issue within the meaning of the international agreement under which the Commission

was established. This allegation the plaintiff denies (R. 236).

Article II of the agreement of 1922, regarding the constitution of the Mixed Commission, reads as follows:

"The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners *die or retire*, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him." (Italics ours.) (Appendix p. ii.)

Bearing in mind the fact that a Mixed Commission means a commission in which each government is represented by a commissioner or commissioners appointed by itself, it is clear that both the United States and Germany, in providing for the filling of vacancies, contemplated that, in case its commissioner should "retire or be unable for any reason to discharge his functions," the work of the Commission would be arrested until the Government by which he was appointed had filled his place.

Nevertheless, notwithstanding the fact that, when the German Commissioner retired, nothing was pending but a motion to reopen the original dismissal of the sabotage claims, the American Commissioner and the Umpire not only proceeded to reopen the original dismissals, but went further and assumed to make awards in favor of the Sabotage Claimants, the Umpire finally saying: "The Commission is prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form." (R. 242).

That this was done not only when nothing but a motion

to reopen was pending but when there had been a specific reservation that the question of the amount of the awards would in any event not be gone into until after the question of Germany's liability had been determined (R. 35, 84, 224, 343).

That although there had been an express arrangement (Answer of defendant-intervener (R. 35), affidavit of Martin (R. 84), affidavit of Rogers (R. 224)), reserving the question of damages to a later stage of the proceedings when Germany's liability should first have been established, the Umpire, an American, after conferences with the American Commissioner, and without counter-evidence submitted by the German Government, and without notice to it, fixed the amount of damages to be awarded to each of the sabotage claimants and granted awards based upon such determination (R. 243).

That on October 30, 1939, the American Commissioner presented to the Umpire 153 awards to sabotage claimants totalling, with interest to January 1, 1928, a sum in excess of Thirty-one million Dollars (\$31,000,000) (R. 63-73). These awards were filed with the Commission on that day (R. 108).

That even though the shares of stock of the Agency of the Canadian Car and Foundry Company, Ltd. were fully owned by a Canadian corporation (R. 254), on October 30, 1939, an award was granted to said company in the sum of \$5,871,105.20 with interest at the rate of five per cent. (5%) from January 31, 1917 to date of payment (R. 181) which, with interest from January 31, 1917, to January 1, 1928, amounts to more than \$8,750,000.

That the District Court dismissed the complaint on the ground that the certificate of the Secretary of State certifying the awards was controlling. The United States Court of Appeals of the District of Columbia affirmed this judgment, not on the ground that the certificate of the Secretary of State correctly determined the merits of the case, but on the ground that the questions involved were political and beyond judicial review.

JURISDICTION.

The jurisdiction of this Court to issue the writ of certiorari applied for rests upon Title 28 of the United States Code Annotated, Section 347.

QUESTIONS INVOLVED.

The questions involved are:

First. Whether the respective rights of the petitioners and the defendant-intervener to receive payment from the special fund involved a political question not justiciable by the courts.

Second. Whether the certificate of the Secretary of State certifying the awards is conclusive and not subject to judicial review.

Third. Whether, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

Fourth. Whether the alleged awards now in question are not void because, when the American Commissioner and the Umpire assumed to make them, the sole question pending before the commission was whether there was proof of fraud that justified a rehearing.

Fifth. Whether, even if properly constituted, the Mixed Claims Commission was empowered to grant a rehearing.

Sixth. Whether the Mixed Claims Commission, even if properly constituted, was authorized to grant an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was entirely owned by the parent Canadian company, a non-American national.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

That the United States Court of Appeals for the District of Columbia erred in deciding:

1. That the respective rights of the petitioners and the defendant-intervener to receive payment from the special fund involved a political question not justiciable by the courts.
2. That the certification of the awards by the Secretary of State precluded any judicial review.
3. That, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.
4. That the alleged awards are valid, in spite of the fact that, when the American Commissioner and the Umpire assumed to make them, the sole question before the Commission was whether there was such proof of fraud as justified a rehearing.
5. That the Mixed Claims Commission was empowered to grant rehearings of its awards.
6. That as, by the agreement between the United States and Germany, under which it was constituted, the Mixed Claims Commission was authorized to adjudicate only the claims of United States citizens or nationals against Germany, it had no power to make an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was wholly owned by the parent Canadian company.

That the questions here involved are of general importance and questions of substance relating to the construction of a statute of the United States and of a treaty and Executive Agreement made thereunder.

WHEREFORE, your petitioner prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia in this cause, there entitled *Z. & F. Assets Realization Corporation, a Delaware corporation, Plaintiff-Appellant, American-Hawaiian Steamship Company, Intervener-Plaintiff-Appellant, v. Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of Treasury, Defendants-Appellees, Lehigh Valley Railroad Company, Intervener-Defendant-Appellee*, No. 7596, that said cause may be reviewed and determined by this court, and that the judgment of the said United States Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this court may deem meet and proper.

Z. & F. ASSETS REALIZATION CORPORATION,

FRANK ROBERSON,
HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
Solicitors for Petitioner.

JOHN BASSETT MOORE,
JOSEPH M. PROSKAUER,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener;

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Supreme Court of the District of Columbia is not yet reported and may be found on page 295 of the record. The opinion of the United States Court of Appeals is not yet reported.

Jurisdiction.

The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Title 28 of the United States Code Annotated, Section 347.

The reasons relied on for the allowance of the writ are that the United States Court of Appeals for the District of Columbia decided questions of general importance, and questions of substance relating to the construction of a statute of the United States and a treaty of the United States and an Executive Agreement made by the United States, which questions have not been, but should be, settled by this Court.

Statement of the Case.

The statement of the case is set forth in the petition for writ herein.

Specifications of Error.

The United States Court of Appeals erred in deciding:

First. That the respective rights of the petitioners and the defendant-intervener to receive payment from the special fund involved a political question not justiciable by the courts.

Second. That the certification of the awards by the Secretary of State precluded any judicial review.

Third. That, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

Fourth. That the alleged awards are valid, in spite of the fact that, when the American Commissioner and the Umpire assumed to make them, the sole question before the Commission was whether there was such proof of fraud as justified a rehearing.

Fifth. That the Mixed Claims Commission was empowered to grant rehearings of its awards.

Sixth. That as, by the agreement between the United States and Germany, under which it was constituted, the Mixed Claims Commission was authorized to adjudicate only the claims of United States citizens or nationals against Germany, it had no power to make an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was wholly owned by the parent Canadian company.

Statutes and Treaties Involved.

Article III, Clause 1, Section 2, of the Constitution of the United States; the pertinent provisions of the Treaty of Berlin of August 25, 1921; and the English text of the Agreement of August 10, 1922, together with the relevant provisions of the Commission's rules and of the Settlement of War Claims Act, are set out in the Appendix.

Summary of Argument.

I. The conflict of the respective claims of the old award holders and the sabotage claimants to payment from the special deposit fund is not political in the sense of depriving the courts of jurisdiction.

II. The certificate of the Secretary of State that the awards were made is not conclusive as to their validity.

III. After the retirement of the German Commissioner, the Umpire and the American Commissioner were not authorized to function, and their so-called awards were not awards, but mere nullities.

IV. The alleged awards are mere nullities because, when the American Commissioner and the Umpire assumed the power to make them, the sole question before the Commission was whether there had been such fraud as might justify a rehearing.

V. Even if properly constituted, the Mixed Claims Commission was not empowered to grant a rehearing.

VI. The shares of stock of Agency of Canadian Car & Foundry Company, Ltd., being entirely owned by Canadian Car & Foundry Company, Ltd., a Canadian national, the Commission even if properly constituted had no jurisdiction to grant it any award.

Argument.

I.

The conflict between the old award holders and the sabotage claimants as to payment from the special deposit fund is not political in the sense of depriving the courts of jurisdiction to determine their respective rights in that regard.

The Court of Appeals, in holding that it had no jurisdiction to entertain the suit, based its decision solely on the assumption that the questions involved did not present a case or controversy which the courts could decide, because they were purely political.

Both the old award holders and the sabotage claimants assert their claims under Section 4 of the Settlement of War Claims Act providing for the payment of proper awards of a properly constituted Mixed Claims Commission.

Thus, there is presented to the Court a conflict of property rights under the statutes and treaties of the United States and therefore not a mere political question.

Willoughby, in his Constitutional Law of the United States, Second Edition, Section 855, page 1336, says:

"When, however, private justiciable rights are involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.

"Thus, as has been set forth in another chapter, [section 318] treaties entered into by the United States not only bind the United States internationally, but create municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty having been entered into the court will follow

its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar."

Jaffe, "Judicial Aspects of Foreign Relations," cited by Justice Miller, says, page 233:

"Many matters relating to foreign affairs which under this logic would be 'political' are, in fact, handled by the courts. *Courts determine whether a claim of sovereign immunity is properly asserted; they interpret treaties; they determine whether Orders in Council relating to prizes are in conformity with international law; they delimit and apply the duties of neutrality. They may do these things in the absence of relevant executive action, thus running the risk of future conflict and contradiction; they may do it in the face of executive action already taken.*" (Italics ours.)

The same argument was made by the Government in the case of *Deutsche Bank v. Cummings*, 83 F. (2d) 554—that the Court did not have jurisdiction to protect the rights of the plaintiff, a former German enemy alien, whose property was sequestered and who sought the return thereof after an attachment levied on the property had been vacated.

Referring to the case of *Chae Chan Ping v. U. S.*, 130 U. S. 581, 9 S. Ct. 623, cited by the Government for the proposition that the rights of the plaintiff in that case were political and, therefore, not the subject of a justiciable controversy, Judge Groner said (p. 563):

"* * * the Supreme Court was at pains to point out the difference between rights of a political nature and rights involving property. As to the latter, the Supreme Court said: 'The rights and interests created

by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property capable of sale and transfer, or other disposition.
* * *

This Court, refusing to dismiss the *Deutsche Bank* case, 300 U. S. 115, for want of jurisdiction, reversed the decision of the Court of Appeals of the District of Columbia on other grounds.

Judge Miller, in his opinion in the present case, quotes from the *Head Money Cases*, 112 U. S. 580, 598, 599. In the very passage quoted by him, the following is stated:

"But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement, as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

In the following cases referred to by Jaffe, *supra*, the federal courts refused to follow the action of the Executive, where treaty rights were involved:

- The Florence H.*, 248 F. 1012 (S. D. N. Y.);
- United States v. Watts*, 8 Sawyer 370 (D. Cal. 1882);
- United States v. Rauscher*, 119 U. S. 407;
- Tartar Chemical Co. v. United States*, 116 F. 726 (C. C. S. D. N. Y.).

It is well known that, where the non-recognition of a government by the Executive leads to unjust results, such non-recognition does not prejudice the private rights of the parties concerned.

- Sokoloff v. National City Bank*, 239 N. Y. 158;
- Banque de France v. Equitable Trust Co.*, 33 F. (2d) 202.

Potter, in his article referred to by Judge Miller, "The 'Political Question' in International Law in the Courts of the United States" (8 Southwestern Political and Social Science Quarterly 127, 137) said:

"* * * courts have, on several occasions, when asked to refrain from passing upon a given question, on the ground that it was political in character declined to accede to such a request * * *. Thus the courts have long since insisted upon their right to take up a treaty directly and enforce it without any intervention from the political departments (*United States v. The Peggy*, 1 Cr. 103). Again they have insisted upon their rights to interpret treaties where interpretation is needed (*United States v. Rauscher*, 119 U. S. 407. In one case the Supreme Court denied *obiter* any obligation to accept interpretations imposed by the political department where private rights are involved: *Charlton v. Kelly*, 229 U. S. 447.) And finally they have insisted upon applying customary international law in a few cases so as to scrutinize the acts of national adminis-

trative authorities and overrule them if need be—in cases involving jurisdiction over alien vessels or persons in port, and in cases of attempted extradition * * * (*Wildenhaus Case*, 120 U. S. 1; *United States v. Rauscher*, 119 U. S. 407)."

Therefore, in this case where there is a conflict of private rights, the complaint should not have been dismissed for want of jurisdiction on the ground that a political question was involved.

Furthermore, where an international tribunal exceeds its power, it has been held that the courts are competent so to decide; and effect has been given to their decision.

Comegys v. Vasse, 1 Peters 193;

Frevall v. Bache, 14 Peters 95;

Judson v. Corcoran, 17 How. 612;

VII Moore, Digest, Sec. 1072, page 30.

The Court has power to determine the scope of the Commission and whether the Commission has exceeded its powers.

Ralston, *The Law and Procedure of International Tribunals*, p. 42.

The Bootstrap doctrine (Harvard Law Review, Vol. 53, p. 652) that a decision of a court as to its own jurisdiction is *res adjudicata* (*Stoll v. Gottlieb*, 305 U. S. 165), does not apply to an arbitral tribunal which derives its charter from an agreement between two governments.

While nominally the claims are prosecuted by the United States and espoused by it, the claims are actually beneficially owned by the claimants.

Administrative Decision No. V, Dec. & Op., p. 192;
Matter of Westbrook, 228 App. Div. 549.

The claimants are the real parties in interest.

Thorpe on International Claims, 59, 60.

The certificate of the Secretary of State certifying awards is not conclusive.

(A) Petitioners Have a Property Right in the Special Deposit Fund.

By the Settlement of War Claims Act of 1928 (45 Stat. 254), Sec. 2(b), the Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of the plaintiffs' awards, as certified pursuant to Sec. 2(a) of said Act. These payments are to be made out of the German Special Deposit Account created by Sec. 4 of the Act in the order of priority provided in Sec. 4(c).

The right to receive payments provided for by Congress is a property right passing to the estate in bankruptcy of the claimant.

Williams v. Heard, 140 U. S. 529;
Comegys v. Vasse, 1 Peters 193.

The Special Deposit Fund is a fund which is the property of the United States, but by Section 4 of the Settlement of War Claims Act, that fund has been appropriated by Congress for the benefit of persons having bona fide awards.

Under the authority of *Houston v. Ormes*, 252 U. S. 469, where a fund has been appropriated by Congress for payment to a specified person, the Treasury officials are charged with the administrative duty to make payments on demand to the person designated and are therefore subject to mandamus.

To the same effect:

Parish v. MacVeagh, 214 U. S. 124.

This Special Deposit fund consists of 20% of the German property seized during the war, unallocated interest thereon, the specific appropriation by Congress of more than \$86,000,000 and the moneys received under the Paris agreement of January 14, 1925 and under the German-American debt agreement of June 23, 1930 (Report of Secretary of Treasury June 30, 1939, p. 76). Consequently, this action comes squarely within the cases holding that, where Congress has made an appropriation for certain persons, those persons may resort to the courts for the enforcement of their right of payment. It is utterly immaterial that these were moneys of the United States. As soon as an appropriation is made, until that appropriation is withdrawn, the direct beneficiaries of such appropriation have rights which may be protected in the courts from improper attack.

(B) In View of Petitioners' Property Right, the District Court had Jurisdiction to Grant a Declaratory Judgment Protecting the Petitioners from Payment of Awards That were Mere Nullities.

In *Perkins v. Elg*, 367 U. S. 325, suit was brought in the District Court of the District of Columbia for a declaratory judgment. The suit was brought against the Secretary of Labor, the Acting Commissioner of Immigration, and the Secretary of State. Declaratory judgment was sought for a declaration that that plaintiff was a citizen of the United States entitled to a passport.

The United States Supreme Court, although it was admitted that the issuance of a passport was within the discretion of the Secretary of State, modified the judgment affirmed by this Court by striking out that portion of the judgment which dismissed the bill of complaint as to the Secretary of State and adjudged that the Secretary of State be included in the declaratory provision of the decree adjudicating the plaintiff to be a citizen of the United States.

This case is clear authority for the proposition that if, as a matter of law, the sabotage awards are invalid and void, the plaintiff is entitled here as against the Secretary of State to a judgment to that effect.

(C) Congress did not Intend That the Certificate of the Secretary of State Should be Regarded as a Judicial Act Foreclosing Inquiry by the Courts.

The District Court held that under Section 2 of the Act of Congress, the legality of disbursements from the special deposit fund is exclusively determinable by the Secretary of State and that his certificate is conclusive.

Section 2 of the Settlement of War Claims Act of 1928 provides:

"(a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission * * *.

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified * * *."

Two things are necessary for payment:

- (1) An award, i.e., a *valid* award;
- (2) A formal certificate of the Secretary of State attesting a valid award.

The plaintiff's position is that, by the above quoted language, the Congress merely intended that the Secretary of State should authenticate the fact that an award had been made (in the same sense that a Notary Public authenticates the signature of the grantor), but that it never intended to vest in the Secretary of State the power to decide whether the authenticated award had been validly made or was in excess of the powers of the Commission itself. In other words, he is not called upon to examine the evidence or their jurisdiction and to affirm or revise the awards, which he certifies to the Secretary of the Treasury. In fact, the Secretary of State in this case acted within a few hours (R. 302, 312, 318), so had no time to make any judicial inquiry, which he must have assumed was not called for.

In construing a kindred statute providing for the issuance of a certificate by the Secretary of State, such certificate has been adjudicated by the courts to be merely a ministerial act and not conclusive. Thus, in the case of *Orinoco v. Orinoco Iron Co.*, 296 Fed. 965, 54 App. D. C. 218, the Orinoco Company, Ltd., hereafter called "Limited Company", had made, through the United States Government, a claim against Venezuela for indemnity because of her illegal annulment of a certain concession, which concession had vested in the Orinoco Company, Ltd. The appellee, the Orinoco Iron Company was the lessee from the Limited Company of mining rights and had expended \$175,000 in exploiting and operating the mines, when the Limited Company was thus ousted. By virtue of the Act of February 27, 1896, chapter 34 (31 U. S. C. 547), all monies received by the Secretary of State from foreign governments and other sources, must be deposited in the Treasury. According to this Act, the Secretary of State is required to determine the amounts due claimants, and certify the same to the Secretary of the Treasury, who must, upon presentation of the certificates of the Secretary of State, pay the amount so found due.

After the payment was made into the Treasury of the United States, a controversy arose between the receiver of the Limited Company and the Orinoco Iron Company as to who was entitled to the fund and the latter sought to have the payment ordered made to it. The Secretary of State refused to recognize the claim of the Orinoco Iron Company and directed the payment of the money to the Limited Company and to other persons designated by it, and sent certificates to the Secretary of the Treasury for such distribution.

The Court of Appeals of the District of Columbia sustained the claim of the appellee, holding that the certificate of the Secretary of State did not interfere with the power of the court to declare the appellee entitled to an equitable lien on the fund and overruled the contention of the Secretary of the Treasury that his duty was merely ministerial.

and that he must carry out the certificate of the Secretary of State. The dissenting opinion states that the Secretary of the Treasury could not be enjoined from carrying out the determination which the Secretary of State was vested with final and exclusive power to make, especially as the Secretary of the Treasury was directed by the statute to make payment in accordance with that determination. In fact, the dissenting Judge said:

"If the Secretary of the Treasury may be enjoined from paying the money to the beneficiaries, it is not apparent why mandamus would not lie to compel payment to the plaintiff" (p. 226).

He went further and stated as follows:

"Indeed, if it be true that the Secretary of the Treasury can be enjoined from making the payments directed by the Secretary of State, then, as a corollary of that proposition, it would seem that the findings of the Secretary of State may be controlled and directed by the judicial department of the government" (p. 226).

The majority of that court did not agree with his contention, and the holding of the majority was affirmed by the United States Supreme Court in *Mellon v. Orinoco Iron Co.*, 266 U. S. 121.

The Statute in the *Orinoco* case seemed possibly to authorize the Secretary of State in his discretion to determine the amounts due claimants respectively from each of such trust funds (to wit, the trust funds represented by monies received from foreign governments).

In the present statute, no such discretion is vested in him. When he receives from the Commission copies of the awards, it is his duty to certify the same without further question and, therefore, as held in *Ferkins v. Elg* (307 U. S. 325), he is subject to a declaratory judgment as to the rights of the various claimants to the special deposit fund.

III.

After the retirement of the German Commissioner, the Umpire and the American Commissioner were not authorized to function, and their so-called awards were not awards, but mere nullities.

Article II of the agreement creating the Commission provides:

"The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him" (Appendix, p. ii).

The rules of the Commission provide (Article VIII, subdivision (a)):

"(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified" (Appendix, p. v).

A similar provision in an international arbitration agreement was held to be mandatory on the tribunal. Thus, where arbitrators in a certain arbitration with Spain differed, and sought the opinion of the Umpire, Count Lewen-

haupt, as to the meaning of Article I providing that the Umpire "shall decide all questions upon which they shall be unable to agree", he held:

"The functions of the umpire are limited by Article I of the agreement to the decision of questions upon which the arbitrators are unable to agree, and which they submit to him for decision. * * *

"* * * if one of the arbitrators refuses to certify the disagreement, the case cannot again come before the umpire under the agreement of 1871." (3 Moore, Arbitrations 2192.)

But in the present case there was even a greater limitation on the powers of the Umpire. He could only decide on matters about which the Commissioners were in disagreement after such disagreement had been certified to him in writing.

Inherent in every court is the power to make its rules of procedure, not inconsistent with the terms of the law or the agreement under which it is created, and these rules, as far as the parties or litigants are concerned, have the force of law and are controlling.

Nealon v. Davis, 18 F. (2d) 175, 57 App. D. C. 133;

United States v. Barber Lumber Co., 169 Fed. 184;

Weil v. Neary, 278 U. S. 160.

In the *Greco-Turkish Agreement of December 1, 1926* (Permanent Court of International Justice Advisory Opinion No. 16 (August 28, 1928) Public Ser. B., No. 16, pp. 20, 21); the following clause appears:

"Article IV.—Any questions of principle of importance which may arise in the Mixed Commission in connection with the new duties entrusted to it by the Agreement signed this day and which, when that

Agreement was concluded, it was not already discharging in virtue of previous instruments defining its powers, shall be submitted to the President of the Greco-Turkish Arbitral Tribunal sitting at Constantinople for arbitration. The arbitrator's awards shall be binding."

This clause gave rise to differences of interpretation regarding conditions for appeal to the arbitrator, and these differences were submitted to the Permanent Court of International Justice at the Hague for an advisory opinion. *The court held that while the two national commissioners could decide when questions of principle of importance arose, the president could act only when the two national commissioners decided that the matter was a question of principle.*

So, therefore, applying the rule announced as the principle of this decision, the Umpire in the present case is empowered to function only when there has been a disagreement certified to him by both Commissioners.

In view of the terms of the agreement, and in view of the fact that the Umpire could function, as such, only after receiving a written certificate of disagreement, the two remaining members could not function as a Mixed Commission.

The power to arrest further functioning of a commission so constituted is well recognized.

"A controversy arose in the proceedings of the London commission under Article VII. of the Jay treaty as to the power of the commission to decide whether it possessed jurisdiction of claims on which a final decision had been rendered by the lords commissioners of appeal—the highest court of appeals in prize cases. In order to prevent the commission from acting on this question, the British commissioners asserted a right to withdraw from the board, the treaty requiring at least one of the commissioners on each side and

the fifth commissioner to be present at the performance of any act appertaining to the commission. In this way the progress of the board was brought to a halt" (VIF Moore, Digest 33).

Similarly, the Mixed Claims Commission of Hungary and Roumania ceased to function when Roumania ordered its national judge to withdraw from that Commission (Collection of Opinions, Articles and Reports bearing upon the Treaty of Trianon, etc., Vol. II, by Dr. Vallotton of Lausanne, a member of the "Institut de Droit International" and former President of the American Norwegian Mixed Arbitral Tribunal (p. 231).

In the Treaty of Berlin, 42 Stat., part 2, page 1939, it is provided:

"(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV" (Appendix, p. i).

The Treaty of Versailles, Part X, Article 304, provides for the creation of Mixed Arbitral Tribunals and provides that these tribunals shall be "a Mixed Arbitral Tribunal." This means that the tribunal shall consist of at least one national of each of the contending party nations.

If one of the commissioners resigns, therefore, the tribunal is no longer a mixed tribunal, especially when, as in this case, the two members left are both Americans.

It was never contemplated that the commissioner of one of the governments and an umpire being a citizen of the same government could be considered as a mixed commission.

It, therefore, clearly appears that after the German Commissioner retired, the functioning of the Commission was suspended until Germany appointed a successor.

IV.

The awards are mere nullities, because the sole question pending before the Mixed Commission when the American Commissioner and the Umpire, sitting alone, usurped the power to make them, was whether there was proof of fraud that justified a rehearing.

The sole question before the Commission was the motion to reopen based upon the petition filed May 4, 1933, praying for

“reopening and rehearing of the decisions in these claims”.

In 1935, Umpire Roberts ruled as follows:

“By the petition and answer an issue was framed.
* * * Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits” (R. 231, 234).

On June 3, 1936, Umpire Roberts again ruled that this was then the sole issue. More than two years later, on September 13, 1938, the American Agent filed a brief in support of his petition for a reopening, and the German Agent on November 16 filed a brief in answer refusing his consent (R. 233). January 27, 1939, the request was repeated, and was again refused (R. 235). Then, after extended argument, the Commission met to deliberate on the application for a rehearing (R. 236), and during its deliberations the German Commissioner retired.

Thereafter, on June 15, 1939, although nothing was then pending but a motion to reopen the original dismissal of the Sabotage Claims, the American Commissioner and the

Umpire, assuming to function as the Mixed Commission, not only proceeded to reopen the dismissals but went further and made awards in favor of the Sabotage Claimants (R. 242).

And on October 30, 1939, although there had been an express arrangement (Answer of defendant-intervener (R. 35), affidavit of Martin (R. 84), affidavit of Rogers (R. 224)), reserving the question of damages to a later stage of the proceedings when Germany's liability should first have been established, the Umpire, after alleged conferences with the American Commissioner, without counter-evidence submitted by the German Government, and without notice to it, determined the amount of damages to be credited to each of the sabotage claimants and granted awards based upon such determination (R. 243).

Defendant-intervener contends that there had been such a disagreement as authorized the Umpire to make a decision, but the contrary appears from the correspondence.

On March 1, 1939, the German Commissioner addressed to the Umpire, Justice Roberts, a letter apprising the latter of his retirement (R. 145). Had he stopped here and said no more, we hardly see how, under the terms of the treaty, his retirement could have been contested, to say nothing of treating it as if it had not been made. Nevertheless, he went on to give his reasons, the substance of which was that he was convinced that the Umpire was not acting impartially.

The United States Commissioner, Mr. Garnett, in his letter of March 3, 1939 (R. 150), stated that at the last meeting it was "agreed that we should proceed to examine the whole record to determine whether, upon the whole record, the American case has been proven", and that it was while they were examining this question that the German Commissioner retired. This seems to destroy the theory later advanced by Mr. Garnett that the German Commissioner's withdrawal is to be treated as ineffective because it prevented them from rendering a decision on opinions finally arrived at and stated (R. 178). It also

completely answers the assertion that when Umpire Roberts assumed to make an award, he had before him that final disagreement of the Commissioners which was essential to his exercise of the power to decide.

What we have here stated is furthermore confirmed by the last two paragraphs of Commissioner Garnett's letter to Mr. Hull, Secretary of State, of March 3, 1939. The paragraph next to the last expressly states that the subject of the conference between the Commissioners and the Umpire on February 28 and March 1, 1939, was whether the evidence adduced to prove that the Hamburg (1930) award was induced by fraudulent testimony was sufficient for that purpose (R. 151). The last paragraph reads as follows:

"After the conference had extended for a considerable time, the Umpire expressed himself in entire agreement with me on this proposition. Thereupon the German Commissioner argued that, if upon an examination of the whole record both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, the petition would have to be dismissed, and he urged upon the Umpire and myself that we should consider the whole evidence for that purpose. We thereupon proceeded to examine the whole record to determine from that record whether the American case had been proven. It was while the Commission was engaged in examining this question that Dr. Huecking's action in regard to his retirement was taken" (R. 151).

As it thus conclusively appears by the American Commissioner's deliberate admission, in an official letter addressed to the Secretary of State, that, when the German Commissioner retired, the Commissioners and the Umpire

were engaged in an examination of all the evidence with a view to determine what their eventual position should be, it is not possible legally to defend the contention that the Empire's award was rendered upon such a disagreement between the Commissioners as the arbitral agreement contemplates.

A court does not reach the stage of final disagreement because the judges, in discussing what its judgment should be, express varying or conflicting views.

V.

Even if properly constituted, the Mixed Claims Commission was not empowered to grant a rehearing.

On October 16, 1930, an award was made dismissing the sabotage claims (R. 224, 260). No action could be taken with respect to said awards except upon the consent of both contesting sovereigns, and no such sovereign consent was in fact given. On the contrary, the German Government, from first to last, protested any further action on said claims on the ground that the Mixed Claims Commission was *functus officio* as to said claims. Under such circumstances, a new and different award would have been void as in excess of power, even if the German Commissioner had consented to the new award, because the German Commissioner had no power to bind his government beyond the terms of the original agreement of submission. Agents of sovereign powers have no authority to bind their sovereigns *in invitum* to acts in excess of power because their function on such a tribunal is always limited by the terms of the submission.

The authorities are clear that a final award is subject to revision only on the consent of the contesting sovereigns.

In Hyde on International Law, the following language appears (p. 157), Volume Two:

"The decision of an international tribunal over matters as to which it is made the supreme arbiter is said

to be final, and not the subject of revision, except by the consent of the contesting sovereigns."

In the *Cerruti case (Italy v. Colombia)*, 10 Rev. du Droit Pub. 523, 526, President Cleveland was the arbitrator. The Colombian Government protested against Article 5 of the award. Secretary of State Sherman replied to the Colombian Minister, May 9, 1897 (For. Rel. 1898, pp. 250, 251):

"The President of the United States, whether he be the individual who acted as arbitrator, or his successor in office, became under any circumstances, *functus officio*, so far as the arbitration was concerned, upon the rendition of his award and could not undertake to reopen the arbitration and reconsider the award under any just view of the powers conferred upon him as arbitrator by the protocol under which he acted. Should the parties to the arbitration invite the reconsideration of the award in question, in whole or part, or request its interpretation in any respect, that could only be accomplished by a new submission and arbitration."

To this effect see also *Claim of Manuel de Cala*, 2 Moore's International Arbitrations, 1273-4.

In the *Claim of Benjamin Weil*, 2 Moore's International Arbitrations, 1324, 7. Moore's Digest, 63-8, an award in favor of claimant Weil had been made by the United States and Mexican Claims Commission of 1868.

Upon an application for rehearing the Umpire refused the motion on the ground, as stated in Moore's Int. Arb., Vol. II, page 1329:

"* * * (1) that he had no right to consider any evidence besides that which had already been before the commissioners, had been examined by them, and transmitted to the umpire; (2) that, as he had already examined that evidence with all the care of which he was capable, it was not likely that a re-

examination of it would alter his opinion; (3) that as his decisions had, without his wishes being consulted, been made public, and as they were known by the convention to be final and without appeal, it was probable that they had been made the basis of transactions which an alteration or reversal of them might seriously prejudice; and (4) that, in his opinion, the provisions of the convention in effect debarred him from rehearing cases which he had already decided, and deprived each government of the right to expect that any claim should be reheard." (Italics ours.)

In *Frelinghuysen v. Key*, 110 U. S. 63, which was an action by the assignee of part of the Weil claim to mandamus the Secretary of the Treasury to pay the award, Chief Justice Waite of the Supreme Court said at page 72:

"As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two governments or otherwise. Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not now seek to do."

This language was approved in *Boynton v. Blaine*, 139 U. S. 306, 321-2 (1891).

In *Ralston*, *The Law and Procedure of International Tribunals*, §371, pp. 207-8, the following is stated:

"371. *Rehearings and revision.*—Rehearings have been repeatedly refused by umpires, either of their own decisions or of those of their predecessors, such being also the stand taken by the commission appointed pursuant to the treaty of Guadalupe Hidalgo, and it being said by Baron Blanc of the Spanish-American Claims Commission that he did not consider

himself 'empowered to review the formal decisions of the precedent umpires, such decisions being essentially definitive, according to international usages.'"

In view of the principle thus authoritatively established and repeatedly applied, it is clear that the so-called award of 1939 in favor of the Sabotage Claimants constituted a usurpation of powers to which the following passage in an article by the Norwegian Professor Castberg, *L'Exces de Pouvoir dans la Justice Internationale Academie de Droit International, Recueil des Cours, 1931, I, p. 448*, is directly applicable:

"If there has been a usurpation of power, the so-called 'judgment', pronounced by the judge, has in reality no value as judgment. It is absolutely void. It is non-existent from a juridical point of view."
(Translation ours.)

Castberg, *supra*, also in the same article says (p. 388) in regard to non-observance of the rules of the Commission:

"An arbitral tribunal may also commit an excess of power by applying to its proceedings rules of procedure differing from those which were prescribed to the tribunal. This disregard of the rules of procedure does also involve an excess of power." (Translation ours.)

and further at page 442:

"If an international tribunal would assume a power without basing it on an agreement between the parties, there would actually be a usurpation of power. The judgment should then be a nullity for the parties. The same would be true if the judgment is only apparently based upon an agreement of the parties—in other words, if the reference by the court to the

agreement between the parties is only aimed to cover a usurpation of power. Also in this case the judgment would be a nullity." (Translation ours.)

In Oppenheim, International Law, 5th Ed., Vol. 2, page 28, the following is stated:

"The first is that their jurisdiction is essentially grounded in the will of the parties as expressed in the compromise or in the general arbitration treaty and that an award in the excess of the power conferred upon them is null and void as having no legal basis whatever."

Elihu Root as Secretary of State, took on February 28, 1907, a similar position regarding the case of the Orinoco Steamship Company, as appears by the following passage in Hyde, International Law, Vol. 2, page 158:

"Declared Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, respecting the claim of the Orinoco Steamship Company: 'A decree of a court of arbitration is only final provided the court acts within the terms of the protocol establishing the jurisdiction of the court. * * * A disregard of such terms necessarily deprives the decision of any claim to finality.' For. Rel. 1908, 774, 783, See, also, Same to Same, June 21, 1907, id., 800, 802-803."

Nor has there been a single instance in which the Mixed Commission, when legally constituted and actually existing, set aside or revised its awards, except "on agreed statements, recommending awards, signed by both the German Agent and the Agent of the United States" (R. 93).

In the American Journal of International Law of January, 1940, pages 23, 24, the counsel for one of the sabotage claimants (a former solicitor of the Department of State),

referring to the decision of December 15, 1933, in this case, says as follows:

"The significance of this decision in international law is that it is the first instance known to the writer in which a decision of an international tribunal obtained by fraud, collusion, and suppression of evidence by witnesses of one of the parties has been reopened and reheard by the tribunal itself." (Italics ours.)

As regards the finality of decisions, Article VI of the Agreement between the United States and Germany of August 10, 1922, creating the Mixed Claims Commission, expressly provides that "the decisions of the Commission and those of the Umpire (in case there may be any) shall be accepted as final and binding upon the two Governments." Accordingly, the rules enacted by the Commission do not provide for a rehearing, nor did the Commission, when legally constituted and actually existing, ever grant a rehearing.

In *U. S. on behalf of Philadelphia-Gerard National Bank*, Op. and Dec., p. 939, the Commission, referring to a claim previously dismissed, said (p. 940):

"Although the rules of this Commission, conforming to the practice of international Commissions, make no provision for a rehearing in any case in which a final decree has been made, this Petition and the supporting Memorandum and evidence have been carefully considered by the Commission."

To the same effect see: *U. S. on behalf of S. Stanwood Menken v. Germany*, Op. and Dec., p. 837; *U. S. on behalf of Knickerbocker Insurance Co. v. Germany*, Op. and Dec., pp. 912, 914.

VI.

The shares of stock of Agency of Canadian Car & Foundry Company, Ltd., being entirely owned by Canadian Car & Foundry Company, Ltd., a Canadian national, the Commission had no jurisdiction to grant it any award.

Appellant contends that, as the Commission's jurisdiction is limited to claims of United States nationals, an award to a Frenchman, a Canadian, or any other non-American national, is wholly void, both because it is contrary to the express terms of the agreement, and because it would deprive American nationals of their proportionate share of the special deposit fund out of which awards are paid.

In the case of Agency of Canadian Car & Foundry Co., Ltd., there is no dispute that the shares of stock of the claimant company are entirely foreign-owned (R. 186); we contend that the court cannot obtain jurisdiction by reason of the fact that some of the shares of the *parent* company are American-owned.

In Administrative Decision No. II (Dec. and Op. Mixed Claims Commission U. S. and Germany, p. 8), the Commission held:

"Original and continuous ownership of claim.—In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership."

Prior to the pronouncement of the American Commissioner and the Umpire in favor of the Agency of Canadian Car & Foundry Company, Ltd., when the Mixed Claims Commission was legally in suspension, the commission, legally constituted and validly functioning, uniformly held

that awards could be made only in favor of American nationals.

H. Herrmann Manufacturing Co. (M. C. C., U. S. and Ger. Docket No. 173);

American Congo Company (M. C. C., U. S. and Ger. Docket No. 504);

Gans Steamship Line (M. C. C., U. S. and Ger. Docket No. 6625);

A. Klipstein and Co. (M. C. C., U. S. and Ger. Docket No. 540);

Lezcano & Company, sucesores (M. C. C., U. S. and Ger. Docket No. 13787);

Henry Cachard and Herman Harjes (Dec. and Op., M. C. C., U. S. and Ger., p. 634);

Societe du Chemin de Fer de Bagdad (Dec. of Mixed Arbitral Tribunals, Vol. I, pp. 401-407).

In the case of *I'm Alone*, 29 American Journal of International Law (1935), p. 326, a tribunal was created under an agreement between Canada and the United States consisting of Justice Van Deranter of the Supreme Court of the United States and Judge Duff of the Supreme Court of Canada. The first question was whether the Commissioners could enquire into the beneficial or ultimate ownership of the "I'm Alone" or of the shares of the corporation that owned the ship. The answer was in the affirmative, and in the final report, the Commissioners decided (p. 330) *that in view of the fact that the beneficial ownership was entirely in citizens of the United States, no compensation ought to be paid in respect of the loss of the ship or the cargo.*

In Ralston's Law and Procedure of International Tribunals, Rev. Ed., page 155, the following is stated (citing numerous authorities):

"The mixed commissions sitting by virtue of the Versailles and subsequent treaties have several times rendered decisions upon the general subject. Thus, for instance, it has been held that a corporation formed

in Germany and controlled by Frenchmen can claim as a victim of exceptional measures of war, a house which has its site for business affairs in Germany, but of which no associate is German, cannot be considered as a German subject;"

The question of nationality is jurisdictional.

Burthe v. Denis, 133 U. S. 514.

In that case a claim, French in origin, was presented by France on behalf of the executor of the estate of a French national for the value of the property damaged through occupation by the military authorities of the United States. Some of the heirs of the French national, who had a beneficial interest in the claim, were French citizens, others Americans. The Supreme Court held that the Commission under the express terms of the Convention between United States and France creating it was without jurisdiction to consider the claim of the Americans and make an award in their favor.

CONCLUSION.

Therefore, the questions herein are questions of general importance, and questions of substance relating to the construction of statutes and treaties of the United States, and the application should be granted.

Respectfully submitted,

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Appendix.

Constitution of the United States, Article III, Section 2, Clause 1:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

* * * * *

Treaty of Berlin, 42 Stat., Part 2, page 1939:

"(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, Part IV, and Parts V, VI, VII, IX, X, XI, XII, XIV, and XV."

* * * * *

English text of agreement between the United States and Germany for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded between the two Governments on August 25, 1921, signed August 10, 1922.

AGREEMENT.

The United States of America and Germany being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their pleni-

potentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany, and THE PRESIDENT OF THE GERMAN EMPIRE, Dr. Wirth, Chancellor of the German Empire, who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I.

The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II.

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning

which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III.

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV.

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V.

Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI.

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII.

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate, at Berlin this tenth day of August, 1922.

[SEAL.]

ALANSON B. HOUGHTON.

[SEAL.]

WIRTH.

Rule VIII of the Rules of Procedure of the Mixed Claims Commission, United States and Germany (as adopted November 15, 1922, and as amended from time to time, to December 31, 1932) as set forth in the Appendix to Opinions and Decisions, Mixed Claims Commission, United States and Germany from October 1, 1926 to December 31, 1932 (p. XLII):

VIII.

Decisions.

(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.

(b) The Umpire shall at all times have the right to the complete record in any and all cases and to hear oral argument in his discretion.

(c) The Umpire may join with the two National Commissioners in announcing—or in the event of their disagreement certified to him shall announce—principles and rules of decision applicable to a group or groups of cases for the guidance as far as applicable of the American Agent, the German Agent, and their respective counsel, in the preparation and presentation of all claims.

(d) All decisions shall be in writing and signed by (1) the Umpire and the two National Commissioners, or (2) by the two National Commissioners where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based.

Settlement of War Claims Act of 1928, 45 Stat. 254, Sec. 2.(a), (b), (c), (d); Sec. 4:

SEC. 2. (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the

awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the "Mixed Claims Commission").

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon in accordance with the award; accruing before January 1, 1928.

(c) The Secretary of the Treasury is authorized and directed to pay annually (as nearly as may be) simple interest, at the rate of 5 per centum per annum, upon the amounts payable under subsection (b) and remaining unpaid, beginning January 1, 1928, until paid.

(d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4.

* * * * *

SEC. 4 (a) There is hereby created in the Treasury a German special deposit account, into which shall be deposited all funds hereinafter specified and from which shall be disbursed all payments authorized by section 2 or 3, including the expenses of administration authorized under subsections (c) and (m) of section 3 and subsection (e) of this section.

(b) The Secretary of the Treasury is authorized and directed to deposit in such special deposit account—

(1) All sums invested or transferred by the Alien Property Custodian, under the provisions of section 25 of the Trading with the Enemy Act, as amended;

(2) The amounts appropriated under the authority of section 3 (relating to claims of German nationals); and

(3) All money (including the proceeds of any property, rights, or benefits which may be sold or otherwise disposed of, upon such terms as he may prescribe) received, whether before or after the enactment of this Act, by the United States in respect of claims of the United States against Germany on account of the awards of the Mixed Claims Commission.

(c) The Secretary of the Treasury is authorized and directed, out of the funds in such special deposit account, subject to the provisions of subsection (d), and in the following order of priority—

(1) To make the payments of expenses of administration authorized by subsections (a) and (m) of section 3 or subsection (e) of this section;

(2) To make so much of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), as is attributable to an award on account of death or personal injury, together with interest thereon as provided in subsection (c) of section 2;

(3) To make each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount thereof is not payable under paragraph (2) of this subsection and does not exceed \$100,000, and to pay interest thereon as provided in subsection (c) of section 2;

(4) To pay the amount of \$100,000 in respect of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of \$100,000 and is not payable in full under paragraph (2) of this subsection. No person shall be paid under this paragraph and paragraph (3) an amount

in excess of \$100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid. Pending the completion of the work of the Mixed Claims Commission, the Secretary of the Treasury is authorized to pay such installments of the payments authorized by this paragraph as he determines to be consistent with prompt payment under this paragraph to all persons on behalf of whom claims have been presented to the Commission;

(6) To pay amounts determined by the Secretary of the Treasury to be payable in respect of the tentative awards of the Arbiter, in accordance with the provisions of subsection (s) of section 3 (relating to awards for ships, patents, and radio stations);

(7) To pay to German nationals such amounts as will make the aggregate payments equal to 50 per centum of the amounts awarded under section 3 (on account of ships, patents, and radio stations). Payments authorized by this paragraph or paragraph (6) may, to the extent of funds available under the provisions of subsection (d) of this section, be made whether or not the payments under paragraph (1) to (5), inclusive, of this subsection have been completed;

(8) To pay accrued interest upon the participating certificates evidencing the amounts invested by the

Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld);

(9) To pay the accrued interest payable under subsection (c) of section 2 (in respect of awards of the Mixed Claims Commission) and subsection (h) of section 3 (in respect of awards to German nationals);

(10) To make such payments as are necessary (A) to repay the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld), (B) to pay amounts equal to the difference between the aggregate payments (in respect of claims of German nationals) authorized by subsections (g) and (h) of section 3 and the amounts previously paid in respect thereof, and (C) to pay amounts equal to the difference between the aggregate payments (in respect of awards of the Mixed Claims Commission) authorized by subsections (b) and (c) of section 2, and the amounts previously paid in respect thereof. If funds available are not sufficient to make the total payments authorized by this paragraph, the amount of payments made from time to time shall be apportioned among the payments authorized under clauses (A), (B), and (C) according to the aggregate amount remaining unpaid under each clause;

(11) To make such payments as are necessary to repay the amounts invested by the Alien Property Custodian under subsection (b) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of the unallocated interest fund); but the amount payable under this paragraph shall not exceed the aggregate amount allocated to the trusts described in subsection (c) of section 26 of such Act;

(12) To pay into the Treasury as miscellaneous receipts the amount of the awards of the Mixed Claims

Commission to the United States on its own behalf on account of claims of the United States against Germany; and

(13) To pay into the Treasury as miscellaneous receipts any funds remaining in the German special deposit account after the payments authorized by paragraphs (1) to (12) have been completed.

(d) 50 per centum of the amounts appropriated under the authority of section 3 (relating to claims of German nationals) shall be available for payments under paragraphs (6) and (7) of subsection (c) of this section (relating to such claims) and shall be available only for such payments until such time as the payments authorized by such paragraphs have been completed.

(e) The Secretary of the Treasury is authorized to pay, from funds in the German special deposit account, such amounts, not in excess of \$25,000 per annum, as may be necessary for the payment of the expenses in carrying out the provisions of this section and section 25 of the Trading with the Enemy Act, as amended (relating to the investment of funds by the Alien Property Custodian), including personal services at the seat of government.

(f) The Secretary of the Treasury is authorized to invest and reinvest, from time to time, in bonds, notes, or certificates of indebtedness of the United States, any of the funds in the German special deposit account, and to deposit to the credit of such account the interest or other earnings thereon.

(g) There shall be deducted from the amounts first payable under this section to any American national in respect of any debt the amount, if any, paid by the Alien Property Custodian in respect of such debt which was not credited by the Mixed Claims Commission in making its award.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 382

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF THEREON.

FRED K. NIELSEN,
Attorney for Petitioner,
American-Hawaiian Steamship Company.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION.

The American-Hawaiian Steamship Company, a corporation organized under the laws of New Jersey, respectfully petitions the Supreme Court of the United States to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia rendered in the above entitled cause (No. 7596 in that Court), affirming a decree of the District Court of the United States for the District of Columbia entered on January 6, 1940 (R. 298).

NATURE OF THE CASE.

The present case involves a conflict of rights asserted by American claimants with reference to a fund on deposit in the Treasury Department. The judicial determination of

those rights requires, in the first place, an interpretation of an important Federal statute and, in the second place, an interpretation of important international covenants, which were effectuated by the statutory provisions. The fundamental question raised by the decision of the Court of Appeals is whether judicial action with respect to these questions is precluded by a proper application of principles of constitutional law pertaining to "political" questions.

The plaintiff and the intervener-plaintiff asked for an injunction to restrain the Secretary of State from certifying and to restrain the Secretary of the Treasury from paying some awards said to have been rendered recently by the so-called Mixed Claims Commission, established under an agreement concluded by the United States and Germany on August 10, 1922 (R. 12, 31). Such payments would exhaust the funds in the Treasury available for the payment of awards in accordance with the Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, and leave unpaid awards made many years ago in favor of the plaintiff and in favor of the intervener-plaintiff.

It is shown in the plaintiff's complaint that it is the holder of awards rendered some years ago by the Commission created by the Agreement of August 10, 1922, and that there is an unpaid balance of these awards (R. 3). It is shown by the intervener-plaintiff that it is the holder of awards likewise rendered some years ago by the Commission, and that there is an unpaid balance (R. 23).

It is alleged in the complaint filed by each that the Lehigh Valley Railroad Company and others similarly situated presented claims to the Commission; that they were disallowed by a decision of the two Commissioners, the Umpire participating in 1930; that about nine years later these claimants representing themselves to be holders of awards in their cases desire to have them paid; and that these awards are not awards of the Commission, since only one Commissioner was on the Commission at the time they were rendered, and that the dismissal of the claims in 1930 is a final and binding decision.

The plaintiff brought this action to protect property rights in funds on deposit in the Treasury of the United States amounting to approximately \$24,000,000 (P. 8). Those rights and the rights which the intervener-plaintiff undertook to protect are substantially identical. The rights have their foundation in (1) treaty stipulations concluded by the United States and Germany; (2) provisions of an agreement between the two countries to give effect to those treaty stipulations; and (3) statutory provisions enacted by Congress to give effect to both the treaty stipulations and the provisions of the supplemental agreement.

The Treaty of Versailles embodied many detailed provisions obligating the Government of Germany to pay war indemnities to the governments with which Germany had been at war, called the Allied and Associated Powers, and in favor of their nationals. Among those provisions were some authorizing the Allied and Associated Powers to retain and liquidate, and to apply to specified classes of claims, property within their respective jurisdictions belonging to German nationals.

The Government of the United States did not ratify the Treaty of Versailles, but on August 25, 1921, it concluded a separate treaty with Germany (42 Stat. Pt. 2, 1939) which secured to the United States and in favor of its nationals all the rights with regard to indemnities stipulated in the Treaty of Versailles, and, further, all rights, privileges, and indemnities specified in the Joint Resolution of the Congress of the United States of July 2, 1921 (42 Stat. 105).

For the purpose of giving effect to provisions of the Treaty of August 25, 1921, with regard to compensation to be paid to American citizens for injuries suffered with respect to rights of person and property, the United States and Germany concluded the Agreement of August 10, 1922, which established the Commission, which was charged with the duty of determining the total amount to be paid by Germany in satisfaction of indemnities due to the United States and its citizens by virtue of provisions of the Treaty of August 25, 1921.

4

See Article I for the categories of claims of *citizens* to be passed upon by the Commission (R. 16).

Article II of the agreement reads as follows:

"The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him."

Article VI reads in part as follows:

"The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments."

Section 2 of the so-called Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, reads in part as follows:

"Sec. 2(a) The Secretary of State shall, from time to time, *certify* to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the Agreement of August 10, 1922, between the United States and Germany (referred to in his Act as the 'Mixed Claims Commission'). (Italics inserted.)

"(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928."

Copies of the so-called awards have already been certified by the Secretary of State to the Secretary of the Treas-

ury. That was done after the plaintiff filed its complaint and evidently just before process was served on the Secretary of State. The Marshal endeavored to serve the Secretary through service on the legal adviser for the Department of State on the morning of October 31, 1939, but was unsuccessful. The legal adviser's assistant suggested that service on Mr. Hackworth, the legal adviser, be postponed until the following day, and the Marshal it seems temporarily abandoned his efforts to make service, which was made on the afternoon of October 31 (R. 317). The necessary certificates covering the great number of so-called awards were sent to the Secretary of the Treasury on that day (R. 63-73, 110, 333).

DECISION OF THE DISTRICT COURT.

Mr. Justice Bailey of the District Court held that the issuance of the certificates by the Secretary of State rendered the Court powerless to control the Secretary of the Treasury, and therefore powerless to prevent the payment of the claims to the Lehigh Valley Railroad Company and others. Mr. Justice Bailey referred to the contention of the plaintiff, that the so-called awards were not made by the Commission as the Commission could not function, since one of the Commissioners had resigned, and Mr. Justice Bailey expressed the opinion that that was the plaintiff's strongest contention. However, he declared the claims to be claims of the United States, and he expressed the opinion that Congress had vested the Secretary of State with authority to pass on the question at issue, and whether he decided rightly or wrongly, the Court could not act (R. 295). The trial court's decision evidently was grounded on its interpretation of provisions in the Settlement of War Claims Act of 1928 relating to the functions and the extent of authority vested by that law in the Secretary of State.

DECISION OF THE COURT OF APPEALS.

The Court of Appeals affirmed the decision of the District Court based on an interpretation of the Settlement of War Claims Act of 1928. But the Appellate Court, in affirming the decision of the lower Court, undertook to dispose of the case by application of principles of constitutional law relating to distinctions between functions of the Judicial Department of the Government and functions of the Executive Department.

The Appellate Court's decision is grounded on the theory that the disposition of the case "involves a political and not a judicial question". The decision appears to be based on two fundamental propositions. In the first place, the Court attributes to the appellants the contention, which it is said alone need be considered, namely, "that (1) the Mixed Claims Commission was without jurisdiction to make the awards of October 30, 1939". In the second place, the Court declares that the situation of the pending case "is clearly one of a continuing controversy between the United States and Germany although, paradoxically, neither Government is a party to the present suit". The Court referred to some diplomatic exchanges between the Department of State and the German Embassy in Washington and declared that they show that the proceedings in the present case are of a political nature.

The Court does not specifically deal with the fundamental contentions advanced by the appellants. They have not contended that there can be any proceeding in the nature of a judicial review of acts of an international commission. They have found no fault with any act of the Commissioners or the Umpire performed conformably to the terms of the Agreement of August 10, 1922. They have contended that the awards, said to have been made in favor of the Lehigh Valley Railroad Company and others were not valid awards made by the Commissioners nor by the Umpire; that the so-called awards are void; that they are not awards within the meaning of provisions of the Agreement of

1922, because they are not awards rendered conformably to the terms and requirements of the agreement; that they are simply individual acts of one Commissioner and the Umpire; and that, therefore, the payment of these so-called awards is not authorized by the Settlement of War Claims Act of 1928.

The appellants have taken the position that the courts have the power to determine whether statutory provision found in the Settlement of War Claims Act of 1928 would be properly or improperly executed, if action should be taken conformably to the prayers in the motion for summary judgment and in the motion of the defendants to dismiss the complaint and the bill of intervention. The Law of 1928, of course, contemplates the payment of valid awards only, that is, awards made in accordance with the terms of the Agreement of August 10, 1922. The appellants have contended that, in passing on questions with regard to the execution of the Law of 1928, the courts have the power to construe the pertinent international covenants, to determine whether or not valid awards were rendered through the acts of a single Commissioner and the Umpire. The Agreement of August 10, 1922, was incorporated by reference into the Settlement of War Claims Act of 1928. In construing and applying the statute, it is proper and necessary for the Court to construe the agreement.

JURISDICTION.

The facts involved in the cases relate to conflicting assertions of rights with reference to the fund established by the Act of March 10, 1928. That law and provisions of the Agreement of August 10, 1922, are definitive of those rights. The judgment of the United States Court of Appeals was rendered on June 3, 1940. Jurisdiction to issue a writ of certiorari is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Section 347(a), Title 28, U. S. C.

REASONS FOR THE ALLOWANCE OF A WRIT.

The Court of Appeals has erroneously refused to construe and apply an important Federal statute, the Settlement of War Claims Act of 1928, provisions of which secure rights to the appellants and numerous other holders of valid awards, and has likewise refused to construe important international covenants, also definitive of those rights.

The Court of Appeals has erroneously attributed to the appellant, and has undertaken to refute, a contention to the effect that the Mixed Claims Commission, under the Agreement of August 10, 1922, was without jurisdiction to make certain awards, whereas, the contention of the appellants is that the so-called awards were unauthorized acts of a single Commissioner and the Umpire.

The Court misconstrued principles of law and judicial decisions relating to "political affairs", which under the Constitution are within the authority of the Executive Department of the Government.

In dealing with questions relating to "political affairs", the Court further erred in its conclusion that the pending cases are a "continuing controversy between the United States and Germany", and that a communication addressed by the German Charge d'Affaires *ad interim* to the Secretary of State shows beyond a doubt a "continuing interest of Germany in the proceedings" and the "political nature of the controversy".

In relying on some general principles relating to proceedings before international commissions and tribunals and relating to awards rendered by them, the Court failed to take account of the fact that the status and disposition of awards rendered by the Commission under the Agreement of August 10, 1922, are defined and provided for by the Settlement of War Claims Act of 1928, and further failed to take account of private property interests of claimants defined by that law and by international covenants.

The Court erroneously concluded that the proceeding

instituted in the District Court is not a "case" susceptible of judicial determination.

Issues have accordingly been raised with respect to the constitutional power and the duty of the Judiciary to construe international covenants, which create substantive rights in favor of the American citizens and in favor of the Government, and further to construe important statutory provisions, which define important private rights and give effect to international covenants.

Questions have likewise been raised as to statutory authority vested in the Secretary of State by the War Claims Settlement Act to act in effect as a court, of last resort with respect to the disposition of large sums of money, the statute having been construed by the decision affirmed by the Court of Appeals to have the effect of excluding all judicial examination into questions as to the propriety or impropriety of the execution of that law.

Finally, a question is also presented as to the proper use of the motion for summary judgment precluding a trial of the case on its merits.

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings numbered and entitled on its docket, No. 7596, *Z. & F. Assets Realization Corporation, a Delaware Corporation; American-Hawaiian Steamship Company, Intervener, Appellants v. Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of the Treasury; Lehigh Valley Railroad Company, Intervener*; that the judgment of the Court below be reversed by this Court, and that petitioner have such other and further relief in the premises as to this Court may seem just.

FRED K. NIELSEN,

Attorney for Petitioner, American-
Hawaiian Steamship Company.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of the District Court of the United States for the District of Columbia was rendered on January 3, 1940 (R. 295), and the opinion of the United States Court of Appeals for the District of Columbia was rendered on June 3, 1940.

Jurisdiction.

Jurisdiction to issue a writ of certiorari is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Section 347(a), Title 28 U. S. C..

Statement of the Case.

The petition to which this brief is annexed contains a somewhat detailed statement of the nature of the case including summaries of the opinions rendered respectively by the Courts below.

Specification of Errors.

• The United States Court of Appeals erred:

1. In affirming the decision of the District Court, although the Court of Appeals based its decision on a ground different from that on which the lower Court dismissed the actions filed by the plaintiff and the intervener-plaintiff;

2. In refusing to construe the Settlement of War Claims Act of 1928 and important international covenants incorporated into and given effect by that statute;

3. In misconstruing principles of law relating to "political affairs", which under the Constitution are within the scope of authority vested in the Executive Department of the Government; and in holding that the questions requiring judicial determination were of a political nature and therefore excluded from judicial cognizance;

4. In holding that the proceeding instituted in the District Court is not a "case" susceptible of judicial determination;

5. In misconstruing the functions of the Commission created by the Agreement of August 10, 1922, and in failing to take account of private property rights of American citizens derived from that Agreement and from the Settlement of War Claims Act of 1928, rights which are not affected by forms of procedure before the Commission which the Court discussed in considerable detail in its opinion.

POINT I.

The so-called awards rendered on October 30, 1939, are not awards rendered either by the Commissioners or by the Umpire in accordance with the provisions of the Agreement of August 10, 1922.

The Court of Appeals speaks of awards rendered in favor of the Lehigh Valley Railroad Company and others in 1939 as awards rendered by the "Commission". And on page 11 of its opinion the court seems to attribute to the appellants a failure to distinguish between undisputed valid awards, such as they and others were granted by the Commission or by the Umpire, and so-called awards, the validity of which the appellants have challenged, because they are not awards made conformably to the terms of the Agreement of August 10, 1922. The appellants have sought effectively to distinguish between clearly valid acts performed in accordance with the terms of the Agreement of 1922 and acts at variance with the Agreement. It is accordingly useful to indicate the manner in which awards can and must be made conformably to the requirements of the Agreement of 1922.

The Prescribed Method of Rendering Awards.

It is unnecessary to refer to general international practice with respect to the organization of international tribunals or commissions. The United States and Germany might have organized a tribunal or commission of three members by which cases could be decided by the unanimous or by the majority voice of the members. They chose to adopt another method of dealing with claims growing out of the war. The language of the Agreement of August 10, 1922, is so clear and precise that to attribute to it meanings against the letter is precluded by proper application of the familiar rule that it is not permissible to interpret when there is no need of interpretation. That is a rule of international law as well as a rule of the domestic law of the

United States applicable to the construction of treaty and statutory and constitutional provisions.

Vattel, *The Law of Nations*, Chitty's edition, Sec. 263, p. 244;

Pradier-Fodere, *Traite de Droit International Public*, Vol. II, Sec. 1179, p. 884; Sec. 1188, pp. 895-896;

Hall, *International Law*, 6th ed., Chap. 10, pp. 327-329;

Lake Country v. Rollins, 130 U. S. 662, 670-671;

The Amiable Isabella, 6 Wheaton, 1, 71, 72.

Cases can be decided by the joint action of the two Commissioners, or if the Commissioners disagree, by the sole decision of the Umpire. A single Commissioner can make no sole or partial disposition of a case. The Umpire has no functions unless the Commissioners disagree. When they do disagree, the Umpire acts independently as a court of last resort, so to speak.

"Account being taken of the explicit terms of the Agreement of 1922 with regard to the two methods by which cases could be decided, namely, by the concurrence of the Commissioners, or by the Umpire following disagreement by the Commissioners, it is interesting to note that the Court of Appeals recites in its opinion that, during the course of some deliberations in 1939, "the Umpire and the American Commissioner each expressed the view that the Commission's decision of October 16, 1930, had been induced by fraud". It is at least equally interesting to take note of the explicit statement found in the affidavit of Mr. Harold H. Martin (R. 85). He states that one of the grounds on which a rehearing was sought in 1931 with respect to the decision rendered by the Commission dismissing the claims of the Lehigh Valley Railroad and others in 1930 was "that the Commission had acted irregularly in arriving at its decision of October 16, 1930, in that the Umpire participated with the National Commissioners in their deliberations and thus deprived the United States of the inde-

pendent judgment of the National Commissioners uninfluenced by the opinion of the Umpire" (R. 85).

Clearly the Government of the United States was correct in 1931 with regard to its construction of the terms of the Agreement. The Umpire had no functions to discharge unless the Commissioners disagreed. He had no right to influence them; they had no right to undertake to influence him. However, it is not unnatural that counsel for the United States should not have succeeded in having the decision dismissing the claims declared to be a nullity. There was an agreement between two Commissioners in 1930. That in itself constituted a decision under the terms of the Agreement of 1922. That the United States was deprived of the independent judgment of the National Commissioners was a speculation. Indeed, that there was no such unfortunate situation might reasonably be inferred from the fact that all three recorded themselves to be in agreement.

If, as the Government of the United States properly contended in 1931, the Umpire has no functions unless the Commissioners disagree, then the so-called awards of 1939 in reality are the awards of the American Commissioner. If he has the power to dispose of cases involving vast sums of money, the German Commissioner has the same power.

In view of the contentions advanced in 1931 by counsel acting under the direction of the Department of State, it is of course not strange that counsel for the Secretary of State in the pending case should not now argue that the Umpire could participate in the proceedings or that a case can be decided by one Commissioner and the Umpire. Contentions were submitted by counsel in behalf of the Secretary of State to the effect that the questions involved in the case are of a "political nature", and that the Court had no power to pass on the questions of statutory and treaty interpretation raised by the complaints filed by the plaintiffs in the trial Court.

It is also significant that the American Commissioner in his opinion in which he undertook to justify the disposition

of the case by himself and the Umpire in the absence of the other National Commissioner relies on domestic cases concerned with private agreements relating to private arbitrations. These cases in no way involve international covenants, and they have no international aspects and no application even by way of analogy to the questions involved in the present case. Particular reliance is placed by the Commissioner on *Colombia v. Cauca Company*, 190 U. S. 524. The Government of the United States may have used its good offices in facilitating a private adjustment between Colombia and an American citizen, but the arbitral arrangement was a private one, and the suit instituted by Colombia to set aside the award in that arbitration was a private litigation. That litigation was finally disposed of by a decision to the effect that, since the terms of the private agreement in that private arbitration permitted a rendition of an award by two arbitrators, the award rendered was not void because the third arbitrator had not participated in it. The Court in formulating its decision was of course not guided either by international covenants or by rules or principles of international law. The same is true with respect to all the other private litigations cited by the Commissioner. An interesting point in *Colombia v. Cauca* is the action of the Court in revising the arbitral award to the extent that it was outside of the scope of power conferred on the arbitral Commission by the terms of the arbitral agreement.

POINT II.

A determination of the issues in the present case would not result in an interference by the Judiciary with political questions arising in the conduct of foreign relations.

The Scope of Political Questions.

Political questions within the exclusive competence of the Executive Department in the field of international relations obviously are those with which the Executive is concerned by virtue of authority delegated to him by the Constitution of the United States. The powers are stated in meagre language. But in determining their scope account must be taken of proper measures incident to their execution.

The President is Commander-in-Chief of the Army and Navy and of the militia of the several States when called into service. By virtue of that post the President may conclude armistice agreements and of course make agreements with co-belligerents in a war. Article II, Section 2, Clause 1.

He has the power to make treaties, by and with the advice and consent of the Senate. Article I, Section 2, Clause 2. That power obviously involves the authority to conduct incidental negotiations, and it is well established that it also confers some authority to construe treaties in dealing with problems entering into international relations, although the final interpretation of treaties in the United States pertains to the Judiciary; confers also the power by proper methods to abrogate treaties.

The President has the power to appoint American diplomatic officials and consular officers, and of course it is well established that he has authority to direct those whom he appoints with reference to the discharge of their official duties, including those relating to the protection of the lives and property of the American nationals abroad. *Ibid.*

It is the duty of the President to receive foreign diplo-

matic officers, and by virtue of that authority he conducts correspondence with them with reference to matters concerning which they address the Government of the United States in behalf of their respective Governments. Article II, Section 3. It follows that with the Executive Department rests the authority to accord or withhold recognition of new states or new governments from time to time.

Citations on Which the Court of Appeals Relies.

The pending cases were instituted for the purpose of preventing the payment of funds at variance with the provisions of the Settlement of War Claims Act. The Court has the power to construe that law. The law requires the payment of awards rendered conformably to the Agreement of August 10, 1922. The Court has the power to interpret the terms of the Agreement to determine whether the purported awards rendered in 1939 are such valid awards.

These justiciable questions are not political questions such as those dealt with in the cases cited in the opinion of the Court of Appeals, namely, the recognition by the Executive of foreign states and foreign governments; the protection of American citizens abroad; complaints by one government against another government in relation to infractions of treaties and other matters; the abrogation of treaties; determinations with respect to official acts of foreign governments. Nor do the issues in the pending case involve questions of domestic law such as the delegation of legislative power to the Executive; the lack of the authority of the courts to interfere when Congress passes an act in derogation of treaty stipulations; the refusal of American courts to enforce judicial process with respect to property of a foreign government as well as property of the United States. The appellants did not invoke judicial action to control the Executive in relation to such matters. It is believed that brief references to cases cited by the Court of Appeals will serve to show the nature of each

of the decisions rendered, and that they are in harmony with the above indicated views in relation to "political" questions and justiciable questions.

Oetjen v. Central Leather Co., 246 U. S. 297.

This case was an action in replevin. It was held that acts of General Francisco Villa in seizing property in Mexico could not be examined and modified by a New Jersey court in replevin. The Court declared that it was well established that the Judiciary would be bound by the decision of the Executive with regard to the recognition of governmental authorities in foreign countries.

Lehigh Valley Railroad Co. v. State of Russia, 21 Fed. (2d) 396.

The Government of Russia sued the railroad company for losses sustained in 1916. The Imperial Russian Government having been extinguished, a question was raised as to the right to maintain a suit for damages. The Court said that it would be bound by the action of the Executive Department with respect to the question of recognition of a governmental regime in Russia.

Holzendorf v. Hay, 20 App. D. C. 576.

This is a case in which the Court very naturally declined to issue a writ of *mandamus* to the Secretary of State commanding him forthwith to institute "vigorous and proper proceedings against the Empire of Germany and the Emperor" thereof to recover damages in behalf of the petitioner.

Doe v. Braden, 16 How. 635.

This was an action of ejectment. While negotiations were pending between the United States and Spain for the cession of the Florida territory, the King of Spain made

a grant of a vast tract of land to a Spanish nobleman. The Government of the United States insisted that, before exchange of ratifications of the treaty of cession should take place, it should be declared by the treaty that the grant was annulled. That was done. The claimant contended that the annulment was void. The Court said that it must apply the treaty as the law of the land, and that it could not look into the question whether the King of Spain had a right to declare the annulment embodied in the treaty of cession.

Williams v. Suffolk Insurance Company, 13 Pet. 415.

In this case the Court asserted that it felt bound by conclusions which the Executive had reached with regard to an assertion of jurisdiction over the Falkland Islands by the Government of Buenos Aires.

The views heretofore expressed with regard to the scope of executive authority in dealing with international affairs seems to be clearly defined in the following passage from the opinion of the Court:

"In the case of *Foster v. Neilson*, 2 Pet. 253, 307, and *Garcia v. Lee*, 12 Ibid., 511, this Court have laid down the rule that the action of the political branches of the government in a matter that belongs to them, is conclusive."

Sevilla v. Elizalde, decided April 15, 1940, App. D. C. —.

In this case it was held that the Court could not pass on qualifications of a resident Commissioner of the Philippine Islands in the United States partaking of the character of a foreign diplomatic representative.

Charlton v. Kelly, 229 U. S. 447.

This was an extradition case. Italy requested the sur-

render of an American citizen for trial. Over a long period the Italian Government had refused to surrender Italian subjects for trial in the United States. The Department of State was of the opinion that the treaty obligated each Government to surrender its own nationals, but the Executive had not seen fit to consider Italy's failure to do so an infraction of the treaty warranting the abrogation of the treaty by the United States. The Court referred to the well-known principle of law that the failure of one Government to observe treaty stipulations justifies the other contracting party in terminating the treaty, and the Court declared that, since the treaty had not been abrogated, the Court would enforce its provisions. The Court of course had no authority to give notice of the termination of the treaty which is a function of the Executive to be exercised in conjunction, perhaps, with the Senate.

United States v. Curtis-Wright Export Corporation et al., 299 U. S. 304.

In this case it was held that Congress had not undertaken to make an improper delegation of legislative power to the President under the joint resolution of Congress of May 24, 1934, c. 365, 48 Stat. 811, by which certain authority was conferred upon the President with regard to embargoes on the shipment of arms to American republics.

The Court differentiated between cases involving legislation authorizing the President to act as the agent of Congress in dealing with purely domestic affairs and cases involving grants of authority to the President with reference to activities involving the affairs of other countries. It appears that the Court considered that, in cases of the latter kind, it was not necessary, in order to avoid delegation of legislative power, to prescribe, with respect to the ascertainment of facts, specified by Congress, the same kind of definite standards as must be fixed with reference to executive action in relation to purely domestic affairs.

United States v. Lee, 106 U. S. 196, 209.

Particular reference is made by the Court of Appeals to a passage in the opinion of the Supreme Court in which by way of illustration the Supreme Court referred to the immunity from judicial process of public ships and other property of foreign governments.

In this case the claimed privileged character of officials in charge of property taken by the United States was denied by the Court. Somewhat pertinent to issues in the pending case is the following passage in the Court's opinion:

"No man in this country is so high that he is above the law. No officer of the law may set aside that law with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it" (p. 220).

Marbury v. Madison, 1 Cranch 137, 165.

In the celebrated case in which the Supreme Court held that it had no power to issue a mandamus to the Secretary of State, that being an exercise of original jurisdiction not warranted by the Constitution, the Court in its opinion did enter into some discussion of acts of executive authorities exclusively within the competency of such authorities under the Constitution. It may be useful to quote in addition to the passage used by the Court of Appeals the following:

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of executive, merely to execute the will of the president or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable" (p. 166).

However; the following passage would seem to be much more apposite to the pending case:

"But when the legislature proceeds to impose on that

officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."

Unrelated Diplomatic Correspondence.

Under date of October 3, 1939, the German Charge d'Affaires *ad interim* addressed a note to the Secretary of State objecting to the so-called awards rendered by the Umpire and the American Commissioner in 1939. In this note, it was said that these so-called awards were void because actions of the Umpire and the Commissioner were at variance with terms of submission in the Agreement of August 10, 1922 (R. 195).

It is a well established rule of international law, invoked on several occasions by the Government of the United States, that acts at variance with the terms of submission of an agreement are void. Governments, parties to an international agreement, of course have the power to nullify objectionable awards.

Ralston, *The Law and Procedure of International Tribunals*, pp. 42 *et seq.*;

Moore, *International Law Digest*, Vol. VII, pp. 59-62.

A few pertinent quotations from authorities bearing on the subject may be cited:

Kamarowsky, *Le Tribunal International* (Westman's translation), p. 355:

"The violation of the agreement to arbitrate by the tribunal in any respect whatever."

Rivier, *Principes du Droit des Gens*, Vol. II, p. 185:

"* * * that the arbitrator has exceeded his powers or has not complied with the provisions of the *compromis*."

Hall, *A Treatise on International Law*, 5 ed., p. 363:

"* * * when the tribunal has clearly exceeded the powers given to it by the terms of the instrument of submission."

A reply to this note from the German Embassy was made by the Secretary of State under date of October 18, 1939 (R. 217). The position which he took seems to be unique. He declined to enter into "a discussion of the various complaints and protests" contained in the note. The Secretary of State expressed confidence in the ability and integrity of the Umpire and the American Commissioner and he said that the action of the German Commissioner in retiring "was apparently designed to frustrate or postpone indefinitely the work of the Commission". The Secretary did not discuss the legal effect of the Commissioner's retirement.

A determination of the question whether acts of the distinguished Umpire and the American Commissioner were in conformity with terms of submission in the Agreement of August 10, 1922, would not be a reflection on their ability and integrity.

In a report made by Secretary of State Bayard on the *Pelletier and Lazare* cases, S. Ex. Doc. 64, 49 Cong. 2d Sess., he said:

"The duty of the Executive to refuse to execute a decision which, in spite of the irreproachable character of the arbitrator, appears to be unjust and unfair, has been proclaimed many times by the Department of

State and sanctioned by the Supreme Court of the United States."

It may be observed that the Government of the United States did not impeach the ability or integrity of the King of the Netherlands, when it refused to carry out his decision in the Northeast Boundary case. And the Government of Great Britain did not refuse to discuss the objections made by the United States to that decision but joined in setting aside the award. Moore, *International Law Digest*, Vol. VII, p. 59.

Likewise, the Government of Venezuela did not refuse to discuss with the Government of the United States the latter's protest against the award rendered by the Umpire in the *Orinoco Steamship Company* case on the ground that the Umpire had departed from the terms of submission, but joined in having the Umpire's award passed upon by the Permanent Court of Arbitration at The Hague which declared the award to be a nullity on the ground of a departure from the terms of submission. *American Journal of International Law*, 1911, Vol. 5, p. 230; *Foreign Relations of the United States*, 1909, p. 617.

The Government of the United States refused to accept the award of the Commissioners in the Chamezal Arbitration with Mexico and requested Mexico to undertake to reach another settlement of the boundary controversy involved in that case which Mexico at the time declared its willingness to do. *Foreign Relations of the United States*, 1911, p. 598. The action taken by the Government of the United States involved no reflection on the ability and integrity of the distinguished Canadian jurist, E. Lafleur, who rendered the award.

When the Government of the United States undertook to have declared to be a nullity the awards rendered by the two Commissioners and the Umpire dismissing the claims of the Lehigh Valley Railroad Company and others in

1930, it was probably not intended to reflect on the ability and integrity of the three distinguished gentlemen who rendered the awards, Messrs. Boyden, Anderson and Kieselbach (R. 80) even though it was charged that they had acted "irregularly" in that the Umpire, Mr. Boyden, participated with the National Commissioners in their deliberations and thus deprived the United States of the independent judgment of the National Commissioners uninfluenced by the opinions of the Umpire (R. 85). The charge evidently did imply that the two Commissioners had surrendered their independent judgment.

• The German Government may or may not have learned of the filing of the present case after protest was made through diplomatic channels against acts of the Umpire and the American Commissioner. The Court of Appeals states that the exchange of communications brought the case of the appellants within the realm of political as distinguished from judicial questions. The case presented to the trial court is one in which the plaintiff undertook to secure proper application of the Settlement of the War Claims Act and to prevent action at variance with that law.

By passing on and protecting substantive rights created and secured by statutory provisions and treaty stipulations, the courts do not intervene in the conduct of foreign relations.

• The Agreement of 1922 is concerned with both private and public interests, in that it specifies three classes of claims on which the Commission should pass: (1) "Claims of American citizens" with respect to damage to, or seizure of, property interests within German territory; (2) other claims of "nationals" of the United States with respect to injuries to person or property; (3) claims for damage to which the United States was subjected (R. 16).

The Court of Appeals evidently misconstrued the nature of the Agreement of August 10, 1922. The purpose of the Agreement was to pass on claims *against Germany*. No provision was made for the presentation of any claims against the United States by Germany. The Court in its

opinion refers to "claims of individual citizens presented by their respective governments", and says that the purpose of the agreement "was to ascertain how much was due from one government to the other on account of the demands of their respective citizens." No such purpose is recited in the preamble or articles of the Agreement.

The Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, makes provision for the payment of claims against Germany, and sub-section 2(f) provides that "amounts awarded to the United States in respect of claims of the United States on its own behalf shall not be payable under this section."

In dealing with the question of the so-called "political" aspect of the pending case, it would assuredly be proper to take account of the American interest in the case as well as of the diplomatic notes having no relation to the case. The German Government is not concerned with the domestic machinery employed in interpreting statutes and treaties in the United States. It is not finally bound by any method, judicial or administrative, used here in reaching interpretations of international covenants; nor is the Government of the United States bound by an interpretation adopted by Germany through administrative or judicial action. If the two governments are unable to agree, a final decision binding on both can be reached only through the decision of an international tribunal. Diplomatic exchanges evidently terminated with the refusal of the Secretary of State to discuss questions raised (R. 217).

The case instituted by the plaintiffs is concerned in the first instance with the proper interpretation and execution of a Federal statute, the Settlement of War Claims Act. The defendants are officials of the United States who are represented by other officials. The law to be applied by the court is the law of the United States. The funds in dispute are, as stated by the Court of Appeals, property of the United States and property which has been dedicated to specific purposes by Congressional enactment. If the funds

are misapplied the United States will suffer the loss, unless it can be passed on to American claimants.

The Court of Appeals in its opinion says that "paradoxically, neither government is a party to the suit." It is true that suit was not brought against Germany, and Germany has instituted no action. It is also true that an action against an officer of the Government of the United States to require the proper execution of a statutory duty is not a suit against the Government. *Miguel v. McCarl*, 291 U. S. 442. It would therefore seem that it is paradoxical to say that an action against an official intended to protect property rights secured by statutory provisions is excluded from judicial cognizance as one that involves solely political questions arising in the conduct of the Government's foreign relations. Furthermore, the Secretary of the Treasury is not concerned with the administration of affairs of that nature. And the Secretary of State has declared that he considered it to be improper for him to discuss questions raised whether acts purporting to dispose of large sums of money were taken in conformity with the controlling covenants.

Status of Funds Created by the Settlement of War Claims Act.

The Court of Appeals cites a number of cases in connection with conclusions stated as to the nature of the proceedings before the Commission created by the Agreement of August 10, 1922, and as to the status of the funds established by the Settlement of War Claims Act. In appraising a bearing of those cases it seems to be proper to take account of the Act of February 27, 1896, c. 34, 29 Stat. 32, Sec. 547, Tit. 31, U. S. C., which reads as follows:

"Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others shall be deposited and covered into the Treasury.

"The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

"Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for." (Italics inserted.)

The early cases cited antedated that law. Furthermore, it is of course necessary, and solely necessary, in order to determine the status and proper disposition of the fund created by the Settlement of the War Claims Act, to look to the pertinent provisions of that law.

The District Court and the Court of Appeals in their respective opinions referred to *Mellon et al. v. Orinoco Iron Co.*, 266 U. S. 121. The lower Court said that the case did not involve the ownership of a claim which has been allowed, nor the propriety of an allowance of a claim but whether it has been allowed to the right party. The Court of Appeals declared that the sole issue in that case was the ownership of a specific fund received by the United States from Venezuela.

Orinoco Co., Ltd., et al. v. Orinoco Iron Co., 296 Fed. 965, 54 App. D. C. 218, was an appeal from a decree of the Supreme Court of the District of Columbia establishing the equitable claim of the appellee to the sum of \$56,250 on deposit in the Treasury of the United States, and to prevent the payment of that sum to the Orinoco Co., Ltd.

Under a protocol concluded between the United States and Venezuela, the Department of State had collected from Venezuela a sum of \$385,000 in favor of the Orinoco Co.,

Ltd. and through its certificate had deposited that sum with the Secretary of the Treasury conformably to the requirement of the Act of February 27, 1896. *Treaties, Conventions, International Acts and Agreements*, Malloy, Vol. 2, p. 1887.

The Orinoco Iron Company had laid before the Department of State facts to show that it had an interest in the property which has been confiscated in Venezuela. The syllabus shows succinctly the disposition of the case by the Court of Appeals, which affirmed the decree of the trial court, p. 218:

"Where complainant has an equitable right as against the other complainants in a fund paid, pursuant to the terms of the protocol of a foreign country, into the United States Treasury as a trust fund for the beneficiaries thereof, under Act of February 27, 1896 (Comp. St. Sec. 6668), complainant has a right to equitable relief, though the Secretary of State denied complainant's request to recognize its claim."

In *Mellon et al. v. Orinoco Iron Co.*, 266 U. S. 121, the decree of the Court of Appeals was affirmed by the Supreme Court speaking through Mr. Chief Justice Taft. It is clearly shown by the action of all three courts that the certificate of the Secretary of State was not controlling with regard to the payment of money in satisfaction of the claim, and that the courts are not debarred from concerning themselves with the disposition of funds of this character.

The case does not appear to involve the ownership of a claim. The successful litigant was not the owner of the claim, in whole or in part, since he had not even presented a claim to the Department of State for presentation to the Government of Venezuela. It is therefore not perceived that he could have had any ownership in the fund awarded. But because money was wrongfully awarded the Orinoco-

Company, Ltd., and others, the Court imposed a trust on funds to which it considered the Orinoco Iron Company was entitled as compensation for losses actually sustained.

The Court of Appeals in its discussions of the distribution of awards, of *international* commissions refers further to some cases involving questions relating to the procedure prescribed by Congress in dealing with cases passed upon by *domestic* commissions or boards created by statutes. The nature of these cases can be briefly indicated.

Comegys v. Vasse, 1 Pet. 193.

In Article IV of the Treaty of February 22, 1819, between the United States and Spain, the two Governments made a mutual renunciation of claims against each other. The Court held that a decision of the Commission was final, but it declared that it did not necessarily follow that the Court was debarred from passing on conflicting assertions of rights with reference to an amount awarded and that the decision of the Commission on the subject matter of conflicting assertions of right was beyond the scope of the Commission.

Williams v. Heard, 140 U. S. 529.

A domestic "Court of Commissioners" was established by Congress to make a distribution of funds received by the United States from England in satisfaction of the celebrated so-called Alabama Claims. No appeal from its decisions was provided for by Congress. Its actions were, of course, in no way governed by any international covenants. The question decided in this case was whether a claim passed to assignees in bankruptcy as a part of their estate. Cursorily examined, the generalities in the syllabus of the Court's opinion may convey an erroneous impression as regards the decision. The Court's declaration that the claimant had property rights, even before Congress made provision for the distribution of the Alabama award is in-

teresting. These rights, it was said, grew out of the losses sustained as a result of acts of British authorities.

These above mentioned cases were decided by domestic bodies, so to speak, from whose decisions Congress naturally did not undertake to make any provisions for appeals to the courts. Neither the constitution of these bodies nor the legal status of awards rendered by them was governed by any international covenants.

Distinction Between Judicial Power and Executive Power.

A strangely unfortunate situation exists at present with reference to acts disposing of vast sums of money belonging to the United States and dedicated to specific purposes by Congress.

If the action taken by executive and by judicial authorities be correct, there is no governmental authority that is capable of determining whether such acts shall result in an improper or proper disposition of these funds. The Secretary of State has declared that he would not discuss objections made to acts of the Umpire and the American Commissioner. On the other hand, the Secretary's legal representatives in the pending case have advanced the contention, sustained by the Court of Appeals, that questions raised with regard to acts of the Umpire and the Commission are "political" over which the courts have no power to pass. It is respectfully submitted that the machinery of Government is not so sadly impotent.

In determining whether these cases instituted before the District Court involve non-justiciable, "political" questions, it is of course necessary to take account of the specific problems in relation to which the action of the Court was invoked.

Suit was instituted to prevent a misapplication of a Federal statute, the Settlement of War Claims Act. The fundamental question therefore pertains to the interpreta-

tion and application of that statute. Mr. Justice Bailey did not declare that to be a political question. But he held that by the Settlement of War Claims Act Congress had through the terms relating to certification of awards vested in the Secretary of State powers which prevented a judicial determination of private rights secured by the Act of March 10, 1928, and the Agreement of August 10, 1922. It seems to be clear that the Secretary of State considered—correctly, it is submitted—that he was merely an agency of transmission of certifications of awards. That this is so appears to be clearly shown by the mechanical expedition with which the Department of State certified the numerous awards (R. 63-73, 110).

In construing the Settlement of War Claims Act, the second question requiring solution involves an interpretation of the pertinent clear provisions of the Agreement of August 10, 1922, to determine whether or not the statute would be properly or improperly executed, if the purported awards of 1939 should be paid. With the courts, of course, rest the final interpretation and application of Federal statutes. And the same is true with regard to stipulations of treaties. The courts have been concerned with such questions in hundreds of cases. Crandall, *Treaties; Their Making and Enforcement*, 2nd ed., pp. 466-634.

The plaintiffs did not petition the District Court to review any action of the Commission under the Agreement of August 10, 1922, or any act of the Umpire taken in conformity with the terms of the Agreement. They contended that some individual acts performed at variance with the agreement were not awards, the payment of which could properly be made under the Settlement of War Claims Act out of the fund created by that Act; that such acts performed in the absence of one Commissioner, were not even within the forms of the law, so to speak; and that they are void.

The third question relates to diplomatic correspondence cited in the opinion of the Court of Appeals. Governments,

parties to an international agreement, of course have the power to nullify objectionable awards, even in the absence of such exceptional circumstances as those of the present case, when one Commissioner undertook to act for both Commissioners, and the Umpire accepted such action as valid. Illustrations of the initiation of such action by the Government of the United States have already been cited. The Secretary of State refused to discuss complaints made as to irregularities of such acts of the Commissioner and the Umpire. The appellants in the present case did not ask the Court to interfere in any way in these diplomatic discussions. They did not attempt to have the Court direct the Secretary of State to consider these matters in conjunction with the complaining Government which he declined to do, intimating, it would seem, that such action on his part might be equivalent to intervening "directly or indirectly in the work of the Commission" (R. 217).

POINT III.

The proceeding instituted in the District Court is a "case" within the meaning of Article III, Section 2, Clause 1 of the Constitution.

The appellants, in support of their contention as to the power of the Court to pass on the issues raised in the present case, invoked Article VI, Clause 2, and Article III, Section 2, Clause 1, of the Constitution. With respect to the pertinent provisions of Article III the Court of Appeals in its opinion says:

"Since the case of *Ware v. Hylton*, decided by the Supreme Court in 1796, the courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature or the executive, and, accordingly, have consistently declined jurisdiction of such matters."

It is true, of course, that the Supreme Court of the United States has declared that, when Congress passes an act in derogation of a treaty, the courts will not interfere. The present case involves no such question. However, it is believed that the Supreme Court of the United States has never held that executive action in contravention of a treaty cannot be controlled by the Judiciary. In the present case it is sought to prevent executive action at variance with both statutory provisions and international covenants. The courts will prevent unauthorized acts with reference to matters arising under an extradition treaty. *Rice v. Ames*, 180 U. S. 371. The courts will control executive action for the purpose of upholding treaty stipulations relating to immigration. *Chew Heong v. United States*, 112 U. S. 536. The courts will prevent executive action in derogation of stipulations relating to customs duties. *Bantram v. Robertson*, 122 U. S. 116. The Courts will protect, against executive action, property rights, including inchoate or complete titles to land, guaranteed by treaty stipulations. *Soulard v. United States*, 4 Pet. 511. International Claims are property rights. *Phelps v. McDonald*, 99 U. S. 298; *Comegys v. Vasse*, 1 Pet. 193; *Metzger case, Venezuelan Arbitration of 1903, Ralston's Report*, p. 578. The Courts have controlled executive action in construing treaty stipulations relating to rights of citizenship. *Perkins v. Elg*, 307 U. S. 325.

The Court of Appeals cites *Muskrat v. United States*, 219 U. S. 346, 357. In this case the Court held to be unconstitutional an act of Congress to confer jurisdiction on the Court of Claims, and appellate jurisdiction of the Supreme Court of the United States, to pass on the constitutionality of some acts of Congress affecting rights of Indians.

It is not difficult to understand that the Court should not consider that such a function was not an adjudication of a controversy, and that the Court did not consider that it had advisory or revisionary powers to pass on congress-

sional statutes. In discussing judicial power conferred on the Supreme Court it was said in the opinion:

"That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."

For the reasons above set forth, it is respectfully prayed that this application for Writ of Certiorari be granted.

FRED K. NIELSEN,
Attorney for Petitioner,
American-Hawaiian Steamship Company.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 381

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP CORPORATION, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

REPLY BRIEF TO BRIEFS OF INTERVENER-RESPONDENT AND OF RESPONDENTS HULL AND MORGENTHAU, IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI.

**FRANK ROBERSON,
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Supreme Court of the United States

OCTOBER TERM, 1940

No. 381

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP CORPORATION,
Intervener,

Petitioners.

v.

CORDELL HULL, Secretary of State and HENRY MORGENTHAU,
Secretary of the Treasury; LEHIGH VALLEY RAILROAD
COMPANY, Intervener,

Respondents.

REPLY BRIEF TO BRIEFS OF INTERVENER-RESPONDENT AND OF RESPONDENTS HULL AND MORGENTHAU, IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI.

The Government having recognized

"the important and unusual character of this case"

(p. 18 of its Brief), we are taking the liberty of filing a reply brief because of the many inaccuracies in the statements of fact contained in the brief of the respondent, Lehigh Valley Railroad Company.

On page 3 of the Lehigh Valley brief, it is stated:

"The complaint also sought (too late) to enjoin the Secretary of State from certifying the awards."

In other words, the respondent, the Lehigh Valley Railroad Company claims that because the Legal Adviser to the Secretary of State frustrated attempts to serve the complaint until after the certificates were actually signed (R. 318), petitioners lost their right. The complaint was filed at 9:05 A. M. on October 31, 1939 (R. 302), served upon the Secretary of Treasury at about 9:35 A. M. and upon the Legal Adviser to the Secretary of State at 3:15 P. M. on that day (R. 302, 332). Prior to the service upon said Legal Adviser, the Marshal attempted to serve process and was advised to return the next day, but ignoring such advice, he succeeded in effecting service in the afternoon of the same day (see Affidavit of Administrative Assistant, Legal Adviser's Office, Department of State, R. 318). In the meantime, between 9:05 A. M. and 3:15 P. M. these awards, 153 in number, were certified (R. 318).

In view of the fact that the Department of State was on June 23rd and October 25th, 1939 duly notified of the intention of the petitioners to bring the suit (R. 303-317), this evasion of service of process on the part of the Department of State (R. 318) does not deprive the petitioners of their rights.

Texas & N. O. R. Co. v. Northside Belt Ry. Co.,
276 U. S. 475.

An action is commenced by the filing of the complaint (Civil Procedure Rule 3). Therefore, the statement that the service of process was "too late" is completely unjustified.

It is stated (Lehigh Valley Brief, p. 6), that, under the Agreement of August 10, 1922 (42 Stat. 2200), a commission of three was appointed. The agreement does not provide for such tribunal. The agreement provides (Art. II), that the two governments should each appoint a commissioner, and that only in case of disagreement

shall the umpire, selected by the two governments, function.

Again it is stated (Lehigh Valley Brief, p. 9), that the Commission, on June 3, 1936, set aside its earlier decision of December 3, 1932, but this does not state all the facts.

The decision of June 3, 1936 (R. 140) reads as follows:

"It is therefore decided, that the Decision of this Commission rendered at Washington on the third of December 1932 be set aside. This decision reinstates the cases into the position they were before the Washington Decision was given. *It has no bearing on the Decision rendered at the Hague and does not reopen the cases as far as that decision is concerned.* Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits." (Italics ours.)

Thus, the decision of June 3, 1936, expressly made the reservation that the original award dismissing the claim shall remain unaffected unless fraud was proved sufficient to justify the granting of a rehearing, after which there would be a rehearing on the merits.

On page 24 of the Lehigh Valley brief it is stated that because the Commission was still functioning, in other words, had not ceased to exist, its awards could be reopened at any time. This statement is contrary to the practice of the Commission which regarded each claim as a separate case, the Commission frequently holding, as pointed out in our previous brief (p. 38), that the rules of the Commission make no provision for a rehearing.

The facts of the case of *Benjamin Weil* (p. 25 of Lehigh Valley brief) are not correctly stated. The application for a rehearing was made before the National Commissioners had concluded their labors. The application was presented to the two commissioners. The history of the case appears more fully in *U. S. v. Alice Weil*, 35 Ct. of Clms. Reports, 43. In the footnote is a statement of the material facts of the case.*

Another erroneous statement is found on page 28 of the Lehigh Valley brief. Counsel there tries to give the impression that there was before the Commission the question of the merits of the sabotage claims. The question of the merits, as we have pointed out in our previous brief (p. 6), was expressly reserved until after the decision on the question of rehearing should be granted. One of the questions the Commission was considering at the time of the resignation of the German Commissioner was whether the reopening would be proper "if the new decision on the old and new evidence taken together should be identical in tenor with the Hamburg-Decision" (R. 290). Hamburg-Decision referred to is that of the Commission of October 16, 1930 (R. 260).

This does not authorize the statement that the merits of the claim were before the Commission. It is always proper, upon a motion for a new trial upon the ground of newly discovered evidence, to determine whether the new evidence, taken in connection with the former evidence, would justify a different decision and then, if the motion is granted, to set the matter down for such new trial. No new trial was had herein.

* Award rendered by the Umpire October 1, 1875 (Vol. 2, Moore's International Arbitrations, p. 1326).

Petition for re-hearing submitted prior to retirement of two national commissioners on January 30, 1876.

On January 30, 1876, the two national commissioners had completed their work and retired by the terms of the agreement.

Motion for re-hearing was denied prior to July 31, 1876, for on that date a final award was made (35 Court of Claims, p. 45).

With reference to the quotations with regard to the Jay Treaty of 1794 (3 Moore, *International Adjudications*, Modern Series, p. 170) (Lehigh Valley Brief, p. 29); Judge Moore replied at length in the court below; his reply was summed up by him as follows:

"The two governments [Great Britain and the United States] concurred in the view that, although the absence of the commissioners, first on one side and then on the other, was deliberate, and was designed to prevent the making of awards, yet it did preclude the making of them, in spite of the fact that they had not resigned and were still in office."

It is also contended (Lehigh Valley Brief, p. 31) that having received benefits under the Settlement of War Claims Act, Germany "could not at any stage thereafter frustrate proceedings before the Commission". This is the concluding sentence of a statement of fact set forth on pages 30-31 of the Lehigh Valley brief and is entirely inaccurate. As indicated in *Deutsche Bank und Disconto-Gesellschaft v. Cummings*, 83 F. (2d) 554, 560, reversed on other grounds 300 U. S. 115, the enactment of the Settlement of War Claims Act was based upon the non-confiscatory policy of the United States (Senate Report No. 273, 70th Cong. 1st Session, p. 12) together with the desire to satisfy legitimate claims of citizens of the United States against Germany.

The Settlement of War Claims Act was, in fact, based upon an agreement made between former German owners of property and a committee of American nationals with claims against Germany (*Hearings, Committee on Finance*, Jan. 8, 1927, 69th Cong. 2d Session, p. 129).

On pages 30 and 40 of the Lehigh Valley brief it is claimed that the petitioners have been guilty of unnecessary delay. This statement is completely unjustified. The petitioners believe that the so-called sabotage awards are not awards at all, and that the pendency of the sabotage

claims has for many years delayed further payment on the awards represented by the petitioners.

If these so-called sabotage awards are nullities and the sabotage claims unjustified in fact and law, then the petitioners and others similarly situated have been prejudiced. The filing of the petition for certiorari was timely and, therefore, the insinuations of dilatory tactics on the part of the petitioners is completely unwarranted.

On page 4 of the Government brief it is stated that the Special Deposit Fund created by the Settlement of War Claims Act of 1928 (45 Stat. 254) consists of 20% of the seized property of former German enemy nationals, together with funds contributed by the German Government, but omits to state that the fund also consisted of an appropriation made by Congress of more than \$86,000,000 (Report of Secretary of Treasury, June 30, 1939, p. 76), representing the monies appropriated to pay the claims of former German ship and patent owners and awards of the Mixed Claims Commission (Sections 3 and 4 of Settlement of War Claims Act).

On page 5 of the Government's brief it is stated that on June 3, 1936 the Commission rendered a decision, concurred in by the German Commissioner, setting aside its decision of December 3, 1932, denying a rehearing, but the reservation that prior thereto other dismissals of the claims remained intact is not mentioned (see p. 3 of this brief).

On page 6 of the Government's brief it is stated that the German Commissioner addressed a note to the Umpire declaring that the Commission was without power to reopen the case and that he was therefore withdrawing from the Commission. His reasons for withdrawing from the Commission are set forth at pages 145 to 147 of the Record and that ground is not mentioned therein.

On page 7 of the Government's brief the note of October 18, 1939, from the Secretary of State is referred to as a basis for the argument that the question at issue cannot be dealt with because it is purely "political". In

that note (R. 217) the Secretary of State wrote as follows:

"* * * since the Department is without jurisdiction over the Commission I consider that it would be highly inappropriate for it to intervene directly or indirectly in the work of the Commission or to endeavor, in the slightest manner, to determine the course of its proceedings."

It seems to follow from this language that when the Secretary of State certified the so-called awards to the Treasury, he regarded himself as performing a purely ministerial and in no sense, a judicial act.

Certifications in Department practice are ministerial as the regulations printed in the Appendix show.

On page 10 of the Government's brief it is asserted that the petitioners claim that they have standing to sue to mandamus the Secretary of the Treasury. The petitioners also claim that they are entitled to a declaratory judgment (R. 11), similar to that obtained by the plaintiff in the case of *Perkins v. Elg*, 307 U. S. 325.

On page 11 of the Government's brief it is asserted that the present controversy is solely one between the United States and Germany. The present controversy is not between the United States and Germany. It is a controversy between two groups of claimants, the claimants represented by the petitioners asserting that the Special Deposit Account is about to be depleted by payment of so-called awards which are mere nullities and, therefore, the petitioners are entitled to a declaration adjudicating that these so-called sabotage awards are mere nullities and do not come within the provisions of the Settlement of War Claims Act appropriating a certain fund to the payment of only valid awards, which awards cannot be validated by certificates of the Secretary of State.

To sum up, the Commission cannot conclusively pass upon its own jurisdictional errors and irregularities; the

Secretary of State never purported to pass upon these errors and irregularities; the Secretary's certification was purely ministerial; by such ministerial certification he cannot foreclose the property rights of American citizens claiming that a treaty has been violated, and the very speed with which the awards were certified shows the absence of deliberation.

CONCLUSION.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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JOHN F. CONDON, JR.,**
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Assets Realization Corporation.*

**JOHN BASSETT MOORE,
JOSEPH M. PROSKAUER,**
Of Counsel.

Appendix.

Code of Federal Regulations of the United States of America, Title 22 Foreign Relations, Chapter I, Department of State, Subchapter A, Part 8:

PART 8—AUTHENTICATION OF CERTIFICATES

Sec.	Sec.
8.1 Secretary of State: Cordell Hull.	8.4 Fees.
8.2 Acting Secretary of State: R. Walton Moore.	8.5 When certification is desired for unlawful purpose.
8.3 Acting Secretary of State: Sumner Welles.	

Section 8.1 Secretary of State: Cordell Hull. The Chief Clerk and Administrative Assistant, or in his absence the Acting Chief Clerk and Administrative Assistant, is hereby authorized to authenticate certificates under the seal of the Department of State for and in the name of the Secretary of State. The form of authentication shall be as follows: "In testimony whereof, I, Cordell Hull, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant) of the said Department, at the City of Washington, in the District of Columbia this.....day of....., 19.... Cordell Hull, Secretary of State. By.....Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant)."*** [Dept. Order 546, Mar. 6, 1933]

8.2 Acting Secretary of State: R. Walton Moore. The Chief Clerk and Administrative Assistant, or in his absence the Acting Chief Clerk and Administrative Assistant, is hereby authorized to authenticate certificates under the Seal of the Department of State for and in the name of the Acting Secretary of State. The form of authentication shall be as follows: "In testimony whereof, I, R.

*** §§ 8.1 to 8.5, inclusive, issued under the authority contained in R.S. 161; 5 U.S.C. 22.

Walton Moore, Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant) of the said Department, at the City of Washington, in the District of Columbia, this.....day of, 19... R. Walton Moore, Acting Secretary of State. By....., Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant).”** [Dept. Order 597½, Aug. 25, 1934]

8.3 Acting Secretary of State: Sumner Welles. The Chief Clerk and Administrative Assistant, or in his absence the Acting Chief Clerk and Administrative Assistant, is hereby authorized to authenticate certificates under the Seal of the Department of State for and in the names of the Acting Secretary of State. The form of authentication shall be as follows: “In testimony whereof, I, Sumner Welles, Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant) of the said Department, at the City of Washington, in the District of Columbia, this.....day of....., 19... Sumner Welles, Acting Secretary of State. By....., Chief Clerk and Administrative Assistant (or Acting Chief Clerk and Administrative Assistant).” [Dept. Order 687, May 24, 1937]

8.4 Fees—(a) Copy duly authenticated. For a copy from the records duly authenticated a fee of 10 cents for each sheet of 100 words, as required by law (R.S. 213; 5 U.S.C. 166), shall be collected. This applies to copies however made and includes typewritten, photographic, and photostatic copies.

** For statutory citation, see note to § 8.1.

* For statutory citation, see note to § 8.1.

(b) Comparing a copy. Comparing a copy which has already been made, whether in written or printed form, with the original record before authentication shall be construed as making out a copy and the same fee shall be collected.

(c) Copy already made out and compared. No fee shall be charged for furnishing an authenticated copy of a record when such copy has already been made out and compared with the original record—that is to say, where no service of either copying or comparing has been performed.* [Dept. Order 282, Dec. 6, 1923]

8.5 When certification is desired for unlawful purpose. The Department will not certify to a document when it has good reason to believe that the certification is desired for an unlawful or improper purpose. It is, therefore, the duty of the authenticating clerk to examine not only the document which the Department is asked to authenticate but the fundamental document to which previous authentication, or authentications, may have been affixed.* [Dept. Order 235, Dec. 15, 1921]

* For statutory citation, see note to § 8.1.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.
No. 381.

Z. & F. ASSETS REALIZATION CORPORATION,
a Delaware corporation; **AMERICAN-HAWAIIAN**
STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and **HENRY**
MORGENTHAU, Secretary of the Treasury;
LEHIGH VALLEY RAILROAD COMPANY, Inter-
vener,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONER Z. & F. ASSETS
REALIZATION CORPORATION.

FRANK ROBERSON,
HUBERT E. ROGERS,
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Attorneys for Petitioner.

JOHN BASSETT MOORE,
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Of Counsel.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.
No. 381.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

**BRIEF FOR THE PETITIONER, Z. & F. ASSETS
REALIZATION CORPORATION.**

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia (R. 335) is reported in 114 F. (2d) 464. That Court unanimously affirmed an order of the District Court (R. 298) granting the motion of respondents Hull and Morgenthau to dismiss the complaint and the petitioner-intervener's bill of intervention, and also granting the motion of the respondent-intervener, Lehigh Valley Railroad Company for summary judgment

dismissing the complaint and the petitioner-intervener's bill of intervention. The opinion of the District Court (R. 295) is reported in 31 F. Supp. 371.

Jurisdiction.

The jurisdiction of this Court is based upon Title 28 of the United States Code Annotated, Section 347. The petition for writ of certiorari was filed the 29th day of August, 1940, and was granted October 14, 1940.

The District Court of the District of Columbia had jurisdiction to entertain this suit upon the authority of *Houston, Secretary of the Treasury v. Ormes*, 252 U. S. 469; *Mellon v. Orinoco Iron Co.*, 266 U. S. 121; *Doerschuck v. Mellon*, 55 Fed. (2d) 741, 60 App. D. C. 383; *Elg v. Perkins, Secretary of Labor*; *Edward J. Shaughnessy, Acting Commissioner of Immigration, and the Secretary of State*, 307 U. S. 325.

The jurisdiction of the District Court is based, therefore, upon Title 18, §§41, 43 and 44 of the Code of the District of Columbia and 28 U. S. Code, Section 41, subdivision (1)(a).

Statutes and Treaties Involved.

The statutes and treaties involved are set forth in the appendix.

Questions Presented.

The questions involved are:

First. Whether the respective rights of the petitioners and the respondent-intervener to receive payment from

the special fund created by the Settlement of War Claims Act involved a political question not justiciable by the courts.

Second. Whether the certificate of the Secretary of State certifying the awards is conclusive and not subject to judicial review.

Third. Whether, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

Fourth. Whether the alleged awards now in question are not void because, when the American Commissioner and the Umpire assumed to make them, the sole question pending before the commission was whether there was proof of fraud that justified a rehearing.

Fifth. Whether, even if properly constituted, the Mixed Claims Commission was empowered to grant a rehearing.

Sixth. Whether the Mixed Claims Commission, even if properly constituted, was authorized to grant an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was entirely owned by the parent Canadian company, a non-American national.

Seventh. Whether, in view of the fact that issues of fact were involved, respondent-intervener's application for summary judgment should have been denied.

Statement.

Petitioner, and others similarly situated, are holders of awards granted long prior to June 15, 1939, and in most cases prior to the passage of the Settlement of War Claims Act of 1928 (R. 3). This action is brought

by petitioner in behalf of itself and all other American holders of awards granted prior to June 15, 1939, for judgment declaring, among other things, that the decision of the Mixed Claims Commission of October 16, 1930, dismissing the sabotage claims, is final and binding, that alleged awards granted to the Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Co., Ltd., Bethlehem Steel Company and others be declared null and void, and that the Secretary of the Treasury be directed to pay to petitioner and others similarly situated the balance remaining in the German Special Deposit Account to the extent provided for in the Settlement of War Claims Act of 1928.

The five awards to petitioner, Z. & F. Assets Realization Corp., with interest to January 1, 1928, aggregate the sum of \$1,175,918.78, on account of which said petitioner has received the sum of \$864,048.31, leaving a balance unpaid of \$311,870.47, which with interest to January 15, 1936, makes a total aggregate unpaid balance of \$599,373.96 (R. 3).

The petitioner, American-Hawaiian Steamship Company, is the holder of five awards totalling with interest to January 1, 1928, \$4,620,131.57, on account of which it has received \$3,300,000, leaving a balance unpaid in excess of \$1,250,000, which, with interest, makes a total in excess of \$2,000,000 (R. 23).

In contrast to the awards to these old awardholders, the sabotage claims, including those of the Lehigh Valley Railroad Company, Bethlehem Steel Company, Agency of Canadian Car & Foundry Co., Ltd., several insurance companies and others, were, after hearing, dismissed on October 16, 1930 (R. 224, 260), the opinion pointing out that fraud and perjury permeated the evidence adduced by both sides (R. 261-265).

Nine years later, years after a new Umpire and new Commissioners had been appointed, and over eleven years after the enactment of the Settlement of War Claims Act, and long after the Commission was *functus officio* as to their claims, these sabotage claimants, after having lost their case in 1930, obtained alleged awards, dated October 30, 1939, from what is alleged to have been a Mixed Claims Commission, United States and Germany, but what was in fact nothing more than the American Commissioner and Umpire after the retirement of the German Commissioner.

The Lehigh Valley Railroad Company was granted an alleged award in the sum of \$9,900,322.77 with interest from January 5, 1920 (R. 69), which, with interest from said last mentioned date to January 1, 1928, amounts to more than \$13,750,000.

The Agency of Canadian Car and Foundry Company, Ltd., was granted an alleged award in the sum of \$5,871,105.20 with interest from January 31, 1917 (R. 63), which, with interest from said last mentioned date to January 1, 1928, amounts to more than \$8,750,000.

The Bethlehem Steel Company was granted an alleged award in the sum of \$1,886,491.18 with interest from July 30, 1916 (R. 64) which, with interest from said last mentioned date to January 1, 1928, amounts to more than \$2,900,000, and was also granted an alleged award of interest on \$850,412.51 from July 30, 1916, which makes said last mentioned award approximately \$500,000, or a total of more than \$3,400,000.

The alleged awards were made after the retirement of the German Commissioner and over the protest of his Government that the Commission had long since lost jurisdiction to make an award, and contrary to the specific requirement of a written certification of disagreement as a condition precedent to an award by the Umpire.

The alleged awards were made without any testimony being taken as to the extent of the damages. The fixing of the amount of damages was *ex parte*.

If the sabotage claimants are entitled to payment from the Special Deposit Fund, they will strip the fund of approximately \$23,000,000 left in that fund, which would otherwise be paid out to 304 old award holders whose awards still remain unpaid to the extent of approximately \$63,000,000. Approximately 6,000 other old award holders have received payment of their awards in full.

The Secretaries of State and Treasury* are merely nominal defendants—stakeholders between adverse claimants to a Congressional fund. They were made nominal defendants because the Congressional Act had made them the means by and through which the Congressional intent should be effected, it being provided that payments from the fund should be by the Secretary of the Treasury on certification by the Secretary of State.

The District Court held the Secretary's certification conclusive as to the validity of the awards.

Relying upon certain allegations in the respondent-intervener's answer, the District Court stated that the Secretary's certificate had been made before the commencement of this suit (R. 297, 334), with the implied suggestion that the Secretary could forestall judicial review by making his certificate before an Old Award Holder had time to begin suit. This interpretation of its opinion is one which we do not believe the Court intended to be placed thereon, (1) because such an interpretation went far beyond the contention of intervener-respondent below, that the certificate was final irrespective of the pre-

* The respondents, Hull and Morgenthau, moved to dismiss the complaint on the grounds set forth in their notice of motion (R. 294). The contentions of the petitioner in opposition thereto are set forth in Points I and II herein.

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cise second when suit was begun, (2) because of subsequent correction by the Court of its opinion so as to point out that the certificate was only made after the summons and complaint in this suit had been filed and subpoena issued (R. 334), [and while service was attempted to be effected upon the Secretary of State (R. 318)], and (3) because the authorities are clear that a suit cannot be defeated by any act done after the suit has properly been begun by filing in the District Court and notice thereof. Under such circumstances, the Court will restore the *status quo* as of the time of the commencement of the action (*Texas & N. O. R. Co. v. Northside Belt Ry. Co.*, 276 U. S. 475).

There is raised here admittedly no question as to the right of the United States or of the executive branch to seek compensation for war claims against Germany, nor is there any question as to the propriety of the executive branch, if it so desires, to request Congress to make further appropriations for that purpose.

There is admittedly no question as to whether or not any German funds should be appropriated to any of the claims, whether of the old awardholders or of the sabotage claimants.

The funds involved are admittedly the property of the United States and have concededly been appropriated by the Congress for the purposes stated in the War Settlement Act of 1928, namely: payment of proper awards certified to the Secretary of the Treasury by the Department of State (see Appendix, vii).

The funds admittedly being insufficient to satisfy in full the awards of the old awardholders, the question is whether the claimants (intervener-respondent) for the reasons stated shall share in these funds with the old awardholders (petitioners) who contend they should not.

The Secretary of the Treasury, charged with the duty

of disbursing these funds, as we understand his position, is no more than a stakeholder, charged with the duty of making payment to such claimants as may be entitled to the fund under the terms of the Settlement of War Claims Act of 1928.

The Secretary of State, if we understand his position rightly, takes an attitude similar to that of the Secretary of the Treasury, in that he desires the Court to be fully apprised of all relevant facts.

The conflict is, therefore, not between the governments of the United States and Germany or even between a department of the Government of the United States and a private litigant: *it is solely between adverse claimants to a special fund created by an act of Congress.*

Whether the sabotage claimants are entitled to deplete the special fund at the expense of the Old Award Holders involves the question whether their alleged awards were such as were contemplated by the Act of 1928 which in turn includes the questions whether the Mixed Claims Commission, United States and Germany, as established and limited by the 1922 agreement, upon the basis of which the 1928 Statute was enacted, had power to reopen its decision once made dismissing the claims, and the further question whether the Umpire and the American Commissioner, after the German Commissioner had resigned, had power to function as such Commission, and grant awards at all, or to grant them when the only question pending before them was whether a rehearing should be granted, the measure of damages not having been determined.

Petitioners contend that no award exists in favor of the sabotage claimants such as to entitle them to payment from the Special Deposit Fund under the Settlement of War Claims Act of 1928, because the alleged awards made by the Umpire (Honorable Owen J. Roberts) and the

American Commissioner (Honorable Christopher B. Garnett) were not awards by the Mixed Claims Commission, United States and Germany. (The reasons are elaborated at pp. 18-19, *infra*.)

History of Commission.

The Mixed Claims Commission, United States and Germany, was established pursuant to the Treaty of Berlin, dated August 25, 1921 (42 Stat. 1939). This Treaty ended the war between the United States and Germany and reserved for future settlement all claims of American nationals against the German Government.

To insure the payment of said claims, the American Government was permitted by virtue of the Treaty of Berlin to retain possession of all sequestered property until Germany made suitable provision for the satisfaction of American claims.

Pursuant to the provisions of the Treaty of Berlin and of the terms of the agreement annexed to the complaint, the Mixed Claims Commission was established to adjudicate the claims of American nationals.

Thereafter, an American and a German Commissioner, constituting the Commission, were appointed by their respective governments and, with the consent of both governments an American Umpire was chosen (R. 80, 223).

Act of Congress Providing for Payment of Awards.

In 1928 the Settlement of War Claims Act was passed by Congress creating by Section 4 thereof a special deposit account out of which in compliance with Section 2(b) of said act the Secretary of the Treasury was authorized and directed to pay an amount equal to the awards granted by the Mixed Claims Commission.

Dismissals of Sabotage Claims.

Prior to 1930, the sabotage claimants filed numerous claims, including claims of Lehigh Valley Railroad Company, Bethlehem Steel Corporation and Agency of Canadian Car & Foundry Company, Ltd. (R. 82, 223). These claims were dismissed:

First, October 16, 1930, upon the original hearing (R. 224, 260).

Second, March 30, 1931, upon application for rehearing (R. 225). No evidence was filed with this application for rehearing.

Third, December 3, 1932, upon second application for rehearing (R. 225).

In dismissing the first petitions for rehearing, the Umpire expressly pointed out that, although the *rules of procedure made no provision for rehearing*, said petitions had been carefully considered and were dismissed (R. 225).

In dismissing the second application for rehearing, the Umpire,* after a certificate of disagreement by both National Commissioners had been presented to him, found it unnecessary to pass upon the Commission's jurisdiction to grant a rehearing, stating that the conclusions reached made it unnecessary to pass upon that question (R. 227).

Petition of May 4, 1933 for Reopening and Rehearing.

The third petition for rehearing filed May 4, 1933, prayed for (R. 228):

"reopening and rehearing of the decisions in these claims; the United States reserving the right to complete the evidence", etc.

* In this decision of December 3, 1932, Umpire Roberts found that claimants' evidence had been "prepared for the purpose of the case" (Dec. & Op. 1010).

Thus, the sole relief asked for in this petition was "re-opening and rehearing of the decisions in these claims" (R. 228).

The German Government promptly protested to our State Department by letter dated October 11th, 1933, on the ground that the Commission had become *functus officio* when it decided the case (R. 249).

The State Department, however, in answer thereto stated that the question whether the Commission had jurisdiction to entertain a petition for rehearing was one properly to be decided by the Commission itself (R. 229).

Thereafter, two opinions in favor of reopening having been submitted by the American Commissioner, and two opinions by the German Commissioner in opposition, on December 15, 1933 Umpire Roberts, although ruling that the newly discovered evidence did not provide a basis for reopening, stated that the Commission had power to reopen in case the former decision was "induced by fraud" (R. 45, 229).

Pursuant to a special act of Congress passed in 1933, the American Agent subpoenaed a number of witnesses for examination, in which examination the German Government did not participate, taking the position that the sabotage claims, after three dismissals thereof, could not properly be reopened (R. 230).

Thereafter a motion for a bill of particulars of the charges of fraud was made by the German Agent and this motion was denied, Umpire Roberts saying:

"The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer" (R. 230),

thus indicating that the only issue was the issue of fraud.

Attempts to Dispose of the Claims on the Merits.

In 1935 the American Agent filed a motion for an order finally disposing of the claims on the merits, which motion was denied, Umpire Roberts saying:

"By the petition and answer an issue was framed." (R. 231). * * * "Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of re-opening *vel non*, and not upon the merits * * * " (R. 234).

Upon an argument had before the Commission on June 3, 1936 Umpire Roberts again reiterated that the proceedings before the Commission remained strictly limited to the issue of fraud, stating as follows (R. 140):

"Whether upon the showing made, the Commission should grant a rehearing, *unless Germany shall agree to a different course*, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits." (Italics ours.)

Germany never agreed to a different course (R. 233).

In said opinion thus limiting the issue, one of the dismissal decisions, that of December 3, 1932 was set aside, namely, the decision that if new evidence were formally placed before the Commission and considered in connection with the whole body of evidence, the findings and conclusions then reached would not be reversed or materially modified (R. 232).

There is no dispute, however, about the fact that this left the original decision of October 1930 in full force and effect, only subject to the granting of the motion then pending to *rehear* on the specific ground of fraud (R. 232).

The request that the Commission decide the merits of the sabotage claims was again made by the American Agent in his brief filed on September 13, 1938, but the German Agent in his brief filed in answer thereto on November 16, 1938 refused to consent to the course of procedure requested (R. 233).

The request was repeated on January 27, 1939 and again the German Agent refused the request (R. 235).

All the circumstances on the subject: whether Germany consented to a different course, are set forth in the answering affidavit (R. 233-235). The fact is that Germany never consented.

Retirement of the German Commissioner.

After extended argument in January 1939, the Commission met for the purpose of deliberating upon the application for rehearing (R. 235). During said deliberations, the German Commissioner retired.*

The agreement of 1922 under which the Mixed Claims Commission, United States and Germany had been created, had specifically provided for the possibility that one or the other of the Commissioners might "retire or be unable for any reason to discharge his functions" and contemplated that the work of the Commission,—being in its very nature "mixed",—might be arrested until the appointment of his successor.

Article II of said agreement provided (R. 16):

"The Government of the United States and the

*It is the claim of the American Commissioner and of the Umpire and of the respondent Intervener (R. 104) that, when the German Commissioner retired, there had been a disagreement as to the points at issue within the meaning of the agreement establishing the Commission.

This allegation of fact is denied by the petitioner (R. 236), and the evidence in corroboration of this denial set forth at pages 58 *et seq.*, *infra*, clearly raised such an issue of fact as to prevent summary judgment for respondent-intervener.

Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners *die or retire*, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him." (Italics ours.)

The American Commissioner and the Umpire, however, chose to disregard this specific provision of the agreement upon the ground that Germany "seeks to avoid a final conclusion and frustrate the work of the Commission" (R. 241) and proceeded at the hearing of June 15th, 1939 to further action although the German Commissioner had retired, the German Government had protested their jurisdiction and the Umpire proceeded to act without any written certificate signed by both Commissioners of their disagreement, a condition precedent to his power to make any award *in invitum* the German Government.

Fial of June 15, 1939.

Although at that time there was nothing pending but a motion to reopen the original dismissal of the sabotage claims, the American Commissioner and Umpire proceeded not only to reopen the original dismissals but went further and granted awards in favor of the sabotage claimants with the final statement of the Umpire (R. 242):

"* * * the Commission is prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form."

This was done not only when nothing but a motion to reopen was pending but when there had been a specific

reservation that the question of the amount of the awards would in any event not be gone into until after the question of Germany's liability had been determined (R. 35, 84, 224, 243). The amount of the awards, moreover, was not a matter of *form* but of most complicated substance.

Protests by Germany.

On July 11, 1939, a letter was transmitted by the German Embassy to the State Department protesting against the proceedings, the Charge D'Affaires stating (R. 244):

"It is patent that the ruling of the American Umpire relative to the entry of the awards as well as any award that might be signed by the Rump Commission consisting of the American Umpire and the American Commissioner, is null and void" (R. 244, 293).

In this letter he states that the German Government never signified its intention not to cooperate with the Commission (R. 292).

This letter was followed up by a letter of October 3, 1939, in which the principal grounds of protest are fully set forth (R. 195, 245 *et seq.*).

Reservation of Question of Damages.

Although there had been an express arrangement (Answer of respondent-intervener (R. 35), affidavit of Martin (R. 84), affidavit of Rogers (R. 224), reserving the question of damages to a later stage of the proceedings when Germany's liability should first have been established, the American Umpire, after alleged conferences with the American Commissioner, without counter-evidence submitted by the German Government, and without notice to

it, determined the amount of damages to each of the sabotage claimants and granted awards based upon such determination (R. 243).

Awards of October 30, 1939.

On October 30, 1939, the American Commissioner presented to the Umpire 153 awards to sabotage claimants totalling, with interest to January 1, 1928, a sum in excess of Thirty-one million Dollars (\$31,000,000) (R. 63-73). These awards were filed with the Commission on that day (R. 108).

Awards to Non-American Nationals.

Even though the shares of stock of the Agency of the Canadian Car and Foundry Company, Ltd. were fully owned by a Canadian corporation (R. 254), on October 30, 1939, an award was granted to said company in the sum of \$5,871,105.20 with interest at the rate of five per cent. (5%) from January 31, 1917 to date of payment (R. 181), which, with interest from January 31, 1917 to January 1, 1928, amounts to more than \$8,750,000.

Awards were likewise granted to subrogee insurance companies (R. 258) without determining the extent of foreign ownership of the shares of said companies.

Petitioners Had No Standing before Commission.

Under Article VI of the Agreement of August 10, 1922, the only persons who had any standing before the Commission were the two governments and their respective representatives. At no time were the old award holders permitted to appear before the Commission to protect their interests.

Protests by Petitioner, Z. & F. Assets Realization Corporation.

On June 23, 1939, there were sent to the Secretary of State and to the Secretary of the Treasury protests by petitioner, Z. & F. Assets Realization Corp. (R. 307-311) against the decision granting the awards and likewise before process was served herein, the Secretary of State and the Secretary of the Treasury were notified by letter dated the 25th day of October, 1939, that said petitioner would bring suit and ask for an injunction (R. 305, 306).

Specifications of Error.

The United States Court of Appeals erred in deciding:

First. That the respective rights of the petitioners and the defendant-intervener to receive payment from the special fund involved a political question not justiciable by the courts.

Second. That the certification of the awards by the Secretary of State precluded any judicial review.

Third. That, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

Fourth. That the alleged awards are valid, in spite of the fact that, when the American Commissioner and the Umpire assumed to make them, the sole question before the Commission was whether there was such proof of fraud as justified a rehearing.

Fifth. That the Mixed Commission was empowered to grant rehearings of its award.

Sixth. That as, by the agreement between the United States and Germany, under which it was constituted, the Mixed Commission was authorized to adjudicate only the claims of United States citizens or nationals against Germany, it had power to make an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was wholly owned by the parent Canadian company.

Seventh. That notwithstanding that issues of fact were involved, respondent-intervener's application for summary judgment was granted.

Summary of Argument.

I. The conflict of the respective claims of the old awardholders and the sabotage claimants to payment from the Special Deposit Fund is not political in the sense of depriving the courts of jurisdiction.

II. The certificate of the Secretary of State that awards were made is not conclusive as to the validity of the awards.

III. After the retirement of the German Commissioner, the Umpire and the American Commissioner were not authorized to function, and their so-called awards are not awards, but mere nullities.

IV. The alleged awards are mere nullities because, when the American Commissioner and the Umpire assumed the power to make them, the sole question before the Commission was whether there had been such fraud as might justify a rehearing.

V. Even if the Court should find that at the time of the retirement of the German Commissioner the Commis-

sion was properly functioning, then upon the retirement of the Commissioner according to the terms of the agreement of August 10, 1922, all proceedings were brought to a standstill until a new Commissioner was appointed. Assuming, however, that the Commission was properly functioning and was properly considering whether the previous decisions of the Mixed Claims Commission dismissing the sabotage claims should be reopened, and had properly decided that such decisions should be reopened, such decision of the Commission must be limited to the propriety of a rehearing, and all proceedings thereafter, namely, a hearing on the merits of said claims, and a decision on such merits, and the determination of the amount of damages must await the appointment of a new Commissioner.

VI. The decisions of the Mixed Claims Commission being final and binding even if properly constituted, it was not empowered to grant a rehearing.

VII. In accordance with the agreement of August 10, 1922, and in accordance with the ruling of the State Department, and in accordance with the previous decisions of the Commission that a corporation is only entitled to recover to the extent that its capital stock is American owned, and in view of the fact that the stock of the Agency of Canadian Car & Foundry Company, Ltd., was entirely Canadian owned, the Commission, even if properly constituted, had no jurisdiction to grant an award to the Agency of Canadian Car & Foundry Company, Ltd.

VIII. Since issues of fact were involved, respondent-intervener's application for summary judgment should have been denied.

I.

The conflict between the old award holders and the sabotage claimants as to their respective rights to payment from the special deposit fund is not a political controversy beyond the jurisdiction of the courts to determine.

Both the old award holders and the sabotage claimants assert their claims under Section 4 of the Settlement of War Claims Act. That Act provides for the payment, out of a special deposit fund, of proper awards of a properly constituted Mixed Claims Commission. It is conceded that if the alleged awards of the sabotage claimants are paid, the entire special deposit fund will be consumed, thereby depriving the old award holders of any payment on the balance of their claims.

The Court of Appeals, in holding that it had no jurisdiction to entertain the suit, based its decision solely on the assumption that this case turned on a purely political issue which the courts could not decide.

But where a conflict of property rights under statutes and treaties is presented, the determination of these rights by the Executive Department is subject to review by the courts (*Banco de Espana v. Federal Reserve Bank of New York*, 114 F. (2) 438, 442). The doctrine relied on by the Court of Appeals in this case has no application where, as here, the decision of property rights could not in any truly factual sense be deemed an interference with the conduct of our foreign relations by the Executive, nor a matter for the Executive exclusively to determine.

Willoughby, in his *Constitutional Law of the United States*, Second Edition, Section 855, page 1336, says:

"When, however, private justiciable rights are involved in a suit, the court has indicated that it will

not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.

"Thus, as has been set forth in another chapter, [section 318] treaties entered into by the United States not only bind the United States internationally, but create municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty having been entered into the court will follow its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar."

The same principle is recognized by the authorities and texts cited by Judge Miller in his opinion below.

Thus, Jaffe, *"Judicial Aspects of Foreign Relations"* says (233):

"Any matters relating to foreign affairs which under this logic would be 'political' are, in fact, handled by the courts. Courts determine whether a claim of sovereign immunity is properly asserted; they interpret treaties; they determine whether Orders in Council relating to prizes are in conformity with international law; they delimit and apply the duties of neutrality. They may do these things in the absence of relevant executive action, thus running the risk of future conflict and contradiction; they may do it in the face of executive action already taken."

Among the cases to which Jaffe referred are the following instances where the federal courts refused to follow the action of the Executive, where treaty rights were involved:

The Florence H., 248 F. 1012 (S. D. N. Y.);

United States v. Watts, 8 Sawyer. 370 (D. Cal. 1882);

United States v. Rauscher, 119 U. S. 407;
Tartar Chemical Co. v. United States, 116 F. 726
 (C. C. S. D. N. Y.).

Potter, in his article referred to by Judge Miller, "*The Political Question in International Law in the Courts of the United States*" (8 Southwestern Political and Social Science Quarterly 127, 137), said:

"* * *. courts have, on several occasions, when asked to refrain from passing upon a given question, on the ground that it was political in character declined to accede to such a request * * *. Thus the courts have long since insisted upon their rights to take up a treaty directly and enforce it without any intervention from the political departments (*United States v. The Peggy*, 1 Cr. 103). Again they have insisted upon their rights to interpret treaties where interpretation is needed (*United States v. Rauscher*, 119 U. S. 407. In one case the Supreme Court denied ~~obiter~~ any obligation to accept interpretations imposed by the political department where private rights are involved: *Charlton v. Kelly*, 229 U. S. 447). And finally they have insisted upon applying customary international law in a few cases so as to scrutinize the acts of national administrative authorities and overrule them if need be—in cases involving jurisdiction over alien vessels or persons in port, and in cases of attempted extradition * * * (*Wildenhus's Case*, 120 U. S. 1; *United States v. Rauscher*, 119 U. S. 407)."

Similarly, in the *Head Money Cases*, 112 U. S. 580, 598, 599, cited in the opinion below, it is stated:

"But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits

of the other, which partake of the nature of municipal law, and which are capable of enforcement, as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land'. A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

The same argument was made by the Government in the case of *Deutsche Bank v. Cummings*, 83 F. (2d) 554—that the Court did not have jurisdiction to protect the rights of the plaintiff, a former German enemy alien, whose property was sequestered and who sought the return thereof after an attachment levied on the property had been vacated. Judge Groner there made the following comments as to the case of *Chae Chan Ping v. U. S.*, 130 U. S. 581, 9 S. Ct. 623, cited by the Government for the proposition that the rights of the plaintiff in that case were political and, therefore, not the subject of a justiciable controversy (p. 563):

"* * * the Supreme Court was at pains to point out the difference between rights of a political nature

and rights involving property. As to the latter, the Supreme Court said: 'The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them; are such as are connected with and lie in property capable of sale and transfer, or other disposition. * * *'

This Court, refusing to disraiss the *Deutsche Bank* case, 300 U. S. 115, for want of jurisdiction, reversed the decision of the Court of Appeals of the District of Columbia on other grounds.

In *Banco de España v. Federal Reserve Bank of New York* (114 F. 2d at 442), Judge Clark said:

"We do not believe the acts of Secretary Morgenthau in accepting the representations of the Spanish Ambassador are binding upon the courts on a controversy as to the validity of a purchase of property by the United States which does not affect the ~~international or diplomatic~~ relations of our government, but turns rather on the effect of local law on the vendor's title. The courts will leave for the Executive the determination of all 'political' issues; in the international field this means such matters as the recognition of new governments or the making of treaties, not the direct determination of questions of property. Cf. *Doc ex dem Clark v. Braden*, 16 How. 635, 57 U. S. 635, 14 L. Ed. 1090; *Z. & F. Assets Realization Corp. v. Hull et al.*, ... App. D. C. ..., ... F. 2d ..., * June 3, 1940; Field, *The Doctrine of Political Questions in the Federal Courts*, 8 Minn. L. Rev. 485; Jaffe, *Judicial Aspects of Foreign Relations* (1933) 8-78. The decisions investigating the title to the Spanish vessel 'The Navemar' are per-

* Not released by court at date of publication but since reported (114 F. 2d 464).

haps not controlling, since there the Executive Department refused to take a position. *Compania Espanola v. The Navemar*, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667, reversing *The Navemar*, 2 Cir., 90 F. 2d 673; *The Navemar*, 2 Cir., 102 F. 2d 444. But other recent decisions, particularly those concerning the assignment by Soviet Russia of all its claims against American nationals to the United States, indicate that the validity of the title acquired is subject to judicial inquiry. *United States v. Bank of New York*, 296 U. S. 463, 480, 56 S. Ct. 343, 80 L. Ed. 331; *United States v. Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134; *Guaranty Trust Co. v. United States*, 304 U. S. 126, 58 S. Ct. 783, 82 L. Ed. 1224; *United States v. Moscow Fire Ins. Co.*, 60 S. Ct. 706, 725, 84 L. Ed. ..., affirming *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286, 20 N. E. 2d 758, by an equally divided court; 47 Yale L. J. 292; 49 *ibid.* 324; 51 Harv. L. Rev. 162; 31 Am. J. Int. L. 481, 675; 5 U. of Chi. L. Rev. 280. A broader interpretation of 'political' questions is unnecessary to the effective conduct of diplomatic relations with other countries and is undesirable as subjecting issues of private property to the changing circumstances of international politics beyond what is inevitable in any event."

The doctrine of non-justiciability (judicial self-limitation, as it is sometimes called), had its origin in "matters that required no subtlety to be identified as political issues" (*Coleman v. Miller*, 307 U. S. 433, at 460).

"The origin and existence of a State, the existence and justice of a war, or the validity of a revolutionary change in the form of government, are all of them questions which no nation ever allowed Courts to determine" (3 Warren: The Supreme Court in United States History 185).

Accordingly, issues have been held non-justiciable involving the degree of proof requisite for the recognition of a foreign nation (*United States v. Palmer*, 3 Wheat. 610 [1818]; *Kennett v. Chambers*, 14 How. 38 [1852]); the extent of the boundaries of a foreign nation (*Foster & Elam v. Neilson*, 2 Pet. 253 [1829]); the properly constituted representatives of a foreign nation (*Guaranty Trust Co. v. United States*, 304 U. S. 126, 137 [1938]); or the extent of the immunities which will be accorded such representatives (*Schooner Exchange v. M'Faddon*, 7 Cranch. 116 [1812]).

Similarly, jurisdiction has been declined as to the nature of obligations alleged to have been assumed by a new sovereign after a change of sovereignty by cession (*West Rand Central Gold Mining Company, Ltd. v. The King* [1905] 2 K. B. 391) or as to an alleged obligation of a sovereign to turn over to its subjects moneys collected on their behalf from another sovereign (*Rustomje v. The Queen*, 1 Q. B. D. 487, 2 Q. B. D. 69 [1878]). Such issues were purely political since they sought to impose obligations on sovereignty *in invitum*.

Jurisdiction has likewise been declined over issues involving changes in the structure of government itself (*Duke of York's case*, 5 Rotuli Par. 375 [1460]; *Luther v. Borden*, 7 How. 1 [1849]; *Martin v. Mott*, 12 Wheat. 19 [1827]; *Pacific States Telephone Co. v. Oregon*, 223 U. S. 118 [1912]; *Davis v. Hildebrant*, 241 U. S. 565 [1916]; *Mountain Lumber Co. v. Washington*, 243 U. S. 219 [1917]), or relating to the degree of proof requisite for the recognition of a legislative act affecting the structure of government itself (*Field v. Clark*, 143 U. S. 649; *Coleman v. Miller*, 307 U. S. 433).

Finally, it required no subtlety to identify as purely political the question of whether Great Britain, by new acts of hostility, had so broken the Treaty of Peace of

1783 as to make its provisions no longer binding on the courts of the United States (*Ware v. Hylton*, 3 Dall. 199, 258-260), whether Italy had so broken an Extradition Treaty as to make its provisions no longer binding on the courts of the United States (*Charlton v. Kelly*, 229 U. S. 447, 476); whether Germany had impliedly repealed a Prussian-American Extradition Treaty by its adoption of the Constitution for the German Empire, where the "judgment of both governments" was "to the contrary" (*Terlinden v. Ames*, 184 U. S. 270, 290). The questions were political in their very essence, since only the Executive or the Congress could repudiate a treaty or declare it no longer binding on the United States.

Other authorities upon which respondents rely are distinguishable as involving a purely political question which can be determined only by the executive or legislative branch of the Government. In view of the well known principle of law, that an Act of Congress may validly repeal a prior and inconsistent treaty stipulation, it is for the executive branch of the Government to determine whether a treaty has been broken by the later Congressional Act or what remedy shall be given. To this effect see: *Whitney v. Robertson*, 124 U. S. 190; *George E. Warren Corporation v. United States*, 94 F. (2d) 597, cert. den. 304 U. S. 572; and *Botiller v. Dominguez*, 130 U. S. 239.

In these cases, the "political" question upon which the Court declined to pass was the power of the Congress to pass a statute claimed to be inconsistent with some privilege which the treaty-making branch had conferred upon some other nation by the President with the advice and consent of the Senate.

But here we ask merely for a declaration of private rights resulting from Congressional Act and Executive action. We are not asking a determination that the treaty is no longer binding.

Although respondents have, in deference to judicial decisions (*Comegys v. Vasse*, 1 Peters 193; *Fréval v. Bache*, 14 Peters 96; *Judson v. Corcoran*, 17 Howard 612), conceded that controversies relating to priorities of payment and the ownership of awards are not at all in the nature of political questions, they nevertheless contend that the question of the existence or the validity of what in name purports to be an award is somehow so inseparably connected with the conduct by the Executive of foreign relations as to preclude the courts from taking any action to assure to the claimants their actual legal rights. Such a contention is obviously inadmissible, unless it be assumed that the Executive is illegally impeded whenever the courts undertake to inquire into and determine the legality of his acts. It is plain that, in the present instance, neither the proper and lawful conduct of our foreign affairs, nor the proper and lawful conduct of our domestic affairs, would in any way be impeded by a judicial determination that the so-called awards now in question was the result either of a mistaken view of the law or the facts, or of a usurpation of power.

Such a determination would in no way embarrass the Executive in securing a proper determination, by arbitration or otherwise, of the sabotage claims; nor would it constitute more of an interference with executive conduct than the exercise by a court of the concededly judicial function of deciding that an award was made to the wrong person, or that the wrong person had made an award, or that an arbitrator or umpire had made a mistake as to the extent of his powers. Nor could a reversal of the judgment of the court below in the present case constitute in any sense an improper interference with the power of the Executive to conduct foreign affairs.

II.

The certificate of the Secretary of State certifying awards is a ministerial act and not conclusive of the validity of an award.

(a) *Petitioners have a property right in the Special Deposit Fund and are entitled to bring the action.*

By the Settlement of War Claims Act of 1928 (45 Stat. 254), Section 2 (b), the Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of the petitioners' awards, as certified pursuant to Section 2 (a) of said Act. These payments are to be made out of the German Special Deposit Account created by Section 4 of the Act in the order of priority provided in Section 4 (c).

The right to receive payments provided for by Congress is a property right passing to the estate in bankruptcy of the claimant.

Williams v. Heard, 140 U. S. 529;

Comegys v. Vasse, 1 Peters 193.

The Special Deposit Fund is a fund which is the property of the United States, but by Section 4 of the Settlement of War Claims Act, that fund has been appropriated by Congress for the benefit of persons having bona fide awards.

Under the authority of *Houston v. Ormes*, 252 U. S. 469, where a fund has been appropriated by Congress for payment to a specified person, the Treasury officials are charged with the administrative duty to make payments on demand to the person designated and are therefore subject to mandamus.

To the same effect:

Parish v. MacVeagh, 214 U. S. 124.

This Special Deposit Fund consists of 20% of the German property seized during the war, unallocated interest thereon, the specific appropriation by Congress of more than \$86,000,000 and the moneys received under the Paris agreement of January 14, 1925 and under the German-American debt agreement of June 23, 1930 (Report of Secretary of Treasury, June 30, 1939; p. 76). Consequently, this action comes squarely within the cases holding that, where Congress has made an appropriation for certain persons, those persons may resort to the courts for the enforcement of their right of payment. It is utterly immaterial that these were moneys of the United States. As soon as an appropriation is made, until that appropriation is withdrawn, the direct beneficiaries of such appropriation have rights which may be protected in the courts from improper attack.

In the case of

American-Mexican Claims Bureau v. Morgenthau,
26 F. Supp. 904, 906,

in referring to moneys appropriated by Congress for the payment of awards of the Special Mixed Claims Commission, the Court said:

"Under the circumstances here disclosed the money paid into the Treasury of the United States by the Government of Mexico is a trust fund. The beneficiaries of that fund are those claimants who have received awards at the hands of the Special Mexican Claims Commission. The Secretary of State and the Secretary of the Treasury are designated to ad-

minister the fund. The Government of the United States has no claim to it and makes none. Regardless of the outcome of this litigation, the Government will receive none of the fund."

In the opinion of the District Court it is asserted that the claims of the petitioners are claims of the United States, and that the question whether the claims "were properly allowed or not was a question to be raised by the United States and not by individuals who might be wronged by the action of the commission." The learned Justice goes on to say that if there was "any breach of the treaty between the two governments the only recourse would be by action of the contracting parties." For this contention there might be some show of reason, if the money had to be paid on the awards by the one government to the other. But here, as the money was in the possession of the United States, the real question in the present case is one between two classes of American nationals, one of which seeks to take from the other the moneys that had been awarded to it held in the Treasury of the United States.

It is contended by the respondents that the claims of the award holders are claims that belong to the United States and that the United States is solely responsible for their espousal, and that therefore petitioners are not in position to question any act of the Department of State in connection with the claim.

On this subject Umpire Parker in Administrative Decision V said as follows:

"The Umpire agrees with the American Commissioner that the *control* of the United States over claims espoused by it before this Commission is complete. But the generally accepted theory formulated by Vattel, which makes the injury to the national an injury to the nation and internationally therefore the

claim a national claim which may and should be espoused by the nation injured, *must not be permitted to obscure the realities or blind us to the fact that the ultimate object of asserting the claim is to provide reparation for the private claimant*, whose rights have at every step been zealously safeguarded by the United States and who under the Treaty of Berlin is entitled through his Government to receive compensation. Both that Treaty and the Agreement constituting this Commission clearly distinguish throughout between government-owned claims and privately-owned claims. Internationally the distinction is important in determining Germany's obligations under the Treaty of Berlin as illustrated by the decision of this Commission in its opinion construing the phrase 'naval and military works or materials' where it was held that 'So long as a ship is privately operated for private profit she cannot be impressed with a military character, for only the Government can lawfully engage in direct warlike activities.'" (Italics ours.) (Dec. & Op., p. 192.)

This statement was made in the course of aforesaid Administrative Decision dated October 31, 1924, which holds that with respect to Germany's obligations and the jurisdiction of the Commission, no awards shall be granted to the extent that the beneficial interest in the claim is non-American.

In the *Matter of Westbrook*, 228 App. Div. 549, the Court said (p. 550):

"The situation is aptly summed up in Thorpe on International Claims, 1924. As there stated, while the parties to a litigation in an arbitrable tribunal, such as the Mixed Claims Commission, are the sovereign parties to the treaty, such sovereign parties conduct the litigation on behalf of their respective

citizens and the real owners of the claims, and the real parties in interest are the respective citizens (pp. 59, 60)."

Consequently, there is no basis for the contention that the real party in interest is the United States Government and that, therefore, petitioners had no standing to bring this action.

(b) *In view of petitioners' property right, the District Court had jurisdiction to grant a declaratory judgment protecting the petitioners from payment of awards that were mere nullities.*

In *Perkins v. Elg*, 307 U. S. 325, suit was brought in the District Court of the District of Columbia for a declaratory judgment. The suit was brought against the Secretary of Labor, the Acting Commissioner of Immigration, and the Secretary of State, for a declaration that the plaintiff was a citizen of the United States entitled to a passport.

The Supreme Court of the United States, while affirming the judgment of the courts below that the issuance of a passport was within the discretion of the Secretary of State, modified the judgment by including the Secretary of State in that part of it which held the plaintiff to be a citizen of the United States.

This case is clear authority for the proposition that if, as a matter of law, the sabotage awards are invalid and void, the petitioner is entitled here as against the Secretary of State to a judgment to that effect.

Furthermore, this Court has held that where an international tribunal exceeds its power, the Municipal Court is privileged to adjudicate to that effect.

Vol. VII *Moore, Digest*, §1072, page 30.

In *Comegys v. Vasse*, 1 Peters 193, Justice Story held that to the extent that a commission acted within its

jurisdiction, its decisions were final and conclusive; but in so far as it decides in matters beyond its jurisdiction, its acts were not final and conclusive but were subject to review by the municipal courts.

In *Standard Marine Ins. Co. v. Westchester Ins. Co.*, 19 Fed. Supp. 334, affirmed 93 Fed. (2d) 286, cert. denied 303 U. S. 661, Judge Knox, referring to the fact that the Supreme Court, in the *Comegys* case, had held that the award of the Commissioners did not bar an action to review the acts of the Commissioners, in so far as they exceeded their jurisdiction, stated (p. 338):

"If the decision of the Florida commission were conclusive against Vasse, the Supreme Court would not have gone into the merits of his claim. However, it proceeded to do so."

To the same effect see:

Frevall v. Bache, 14 Peters 95.

(c) *Congress did not intend that the certificate of the Secretary of State should be regarded as a judicial act foreclosing inquiry by the courts.*

The District Court held that under Section 2 of the Act of Congress, the legality of disbursements from the special deposit fund is exclusively determinable by the Secretary of State and that his certificate is conclusive.

Section 2 of the Settlement of War Claims Act of 1928 provides:

"(a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission * * * .

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified * * * ."

Clause (a) means merely that the Secretary of State shall certify the award as a genuine document. The contention now made that his certification attests it in any other sense is altogether singular and heretofore unheard of. The Secretary of State neither reads the evidence nor hears the arguments of counsel upon it. In no sense, therefore, can his act preclude subsequent inquiry as to the validity of the award, either nationally or internationally. In enacting clauses (a) and (b), the Congress had in mind solely the fact that an award had been made. It had no thought of precluding inquiry, judicial or otherwise, as to the validity of awards, and least of all as to whether a document called an award was in reality an award of the Mixed Commission set up to give effect to the Treaty and the Act of Congress.

While the agreement of August 10, 1922, under which the Mixed Claims Commission was appointed, was effected by an exchange of notes, its object, as expressly declared in its preamble, was to determine "the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded by the two Governments on August 25, 1921, which secures to the United States and *its nationals* rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles." (*Italics ours.*)

From this it logically follows that as treaties are, by the express terms of the Constitution, "the supreme law of the land", and as such are interpreted and enforced by the courts, the exercise of this power may be invoked by individuals for the assurance of their rights, and particularly those of a financial kind.

"The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to

settle the rights under a treaty, or to affect titles already granted by the treaty itself."

Jones v. Meehan, 175 U. S. 1, 32.

In answer to a protest by the Spanish minister, in 1842, against the exercise by the courts in the United States of the right to interpret and give effect to treaties affecting titles to land, Daniel Webster, who was then Secretary of State, replied that, "in all regular governments, questions of private right, arising under treaty stipulations, are in their nature judicial questions" and that this was particularly the case in the United States, where "a treaty is part of the supreme law of the land," and as such "influences and controls the decisions of all tribunals."

Webster's Works, VI, 399, 400.

The question whether the Congress could have provided for the payment of any claim which the Secretary of State might find to be justified, we are not called upon to discuss; but, if Congress had so intended, it would certainly have provided for the hearing of the parties by the officer entrusted with the determination, as is usual where the administrative determination of matters affecting private rights is intended.

The petitioner's position is that, by the above quoted language, the Congress merely intended that the Secretary of State should authenticate the fact that an award had been made (in the same sense that a Notary Public authenticates the signature of the grantor), but that it never intended to vest in the Secretary of State the power to decide whether the authenticated award had been validly made or was in excess of the powers of the Commission itself. In other words, he is not called upon to examine the evidence or their jurisdiction and to affirm

or revise the awards which he certifies to the Secretary of the Treasury. In fact, the Secretary of State in this case acted within a few hours (R. 302, 312, 318), so had no time to make any judicial inquiry, which he must have assumed was not called for.

The District Court's holding that the Secretary's certificate was conclusive amounts in substance to a claim that the Congressional direction to the Secretary to certify awards was intended to give him the sole and exclusive right to determine the existence and validity of any award made or alleged to have been made by the Commission. If the Congressional intent was to make the Secretary's certificate conclusive, there is as much reason to suppose that such a certificate would be conclusive as to the person in whose favor the award was made, as it would be as to the validity of the award itself.

The logical conclusion of such an interpretation would be to give the Secretary the right to issue a conclusive certificate as to an award in favor of the wrong claimant or an alleged award which had never in fact been made by the Commission. The Secretary's certificate would be conclusive as to the validity of an award even though it had admittedly been forged by a clerk in the office of the American agent of the Commission or made in favor of a German national.

The mere statement of such a possibility tends to negative any inference of Congressional intent to endow the Secretary with any powers so broad.

Whenever the executive determination has been held conclusive in the absence of a statutory provision for a hearing and determination, the statute has either expressly provided for finality (*United States v. Babcock*, 250 U. S. 328, 331), or the character of the executive determination was such as to admit of no doubt that discretion had necessarily been conferred. "To perform that

task, power discretionary in character was necessarily conferred" (*Williamsport Co. v. United States*, 277 U. S. 551, 559). In each case it could fairly be presumed that the Congress had envisaged the likelihood of and necessity for the exercise of executive discretion and the pressing need for executive finality. And where the executive determination includes a finding as to its own jurisdiction, it has generally been assumed that the statute must provide for some method of review (*Newport News Co. v. Schauffler*, 303 U. S. 54, 57; *Myers v. Bethlehem Corp.*, 303 U. S. 41 at 50).

Adams v. Nagle, 303 U. S. 532, is a recent illustration of the circumstances under which executive finality is enforced in the first instance. There the Comptroller's power to determine the necessity for an assessment on bank shares was held necessarily to have conferred discretion to determine "the availability and value of the assets . . . to answer the claims of creditors", and the remote possibility that the assessment might prove excessive and that subsequent reimbursement might be delayed, was more than counterbalanced by the imperative need for prompt action.

Here, however, there was no necessary inference that discretion had been delegated to the Secretary of State, and no imperative need for prompt action by the Secretary on the basis of his determination. In fact, he "determined" nothing except that the document in front of him looked like an award of the Commission.

The functions of the Secretary of State with respect to the fund begin and end with certification; decision was lodged with the Commission, payment with the Secretary of the Treasury. Certification was no more than a vehicle of notification to the Secretary of the Treasury that the Commission had signed, sealed and entered its alleged decision. True, the Secretary of State might

choose to take further diplomatic action if the action of the Commission were unsatisfactory to him (either on moral grounds or for palpable excess of power); but such action would in no sense spring from the Act of Congress, and hence could not enlarge the ministerial quality of his function under the statute.

We submit that the Congress of 1928 would have been surprised if anyone had then suggested that they were making provision for payment at the discretion of the Secretary of State.

If the Secretary of State has by the Statute been vested with the sole power to control disbursements of moneys out of the Special Deposit Account, he has been vested with a power unusual in the extreme, and far removed from the normal functions of his office (*cf. Dismuke v. United States*, 297 U. S. 167, 172).

In construing a kindred statute providing for the issuance of a certificate by the Secretary of State, such certificate has been adjudicated by the courts to be merely a ministerial act and not conclusive. Thus, in the case of *Orinoco v. Orinoco Iron Co.*, 296 Fed. 965, 54 App. D. C. 218, the Orinoco Company, Ltd., hereafter called "Limited Company", had made, through the United States Government, a claim against Venezuela for indemnity because of her illegal annulment of a certain concession, which concession had vested in the Orinoco Company, Ltd. The appellee, the Orinoco Iron Company was the lessee from the Limited Company of mining rights and had expended \$175,000 in exploiting and operating the mines, when the Limited Company was thus ousted. By virtue of the Act of February 27, 1896, Chapter 34 (31 U. S. C. 547); all monies received by the Secretary of State from foreign governments and other sources, must be deposited in the Treasury. According to this Act, the Secretary of State is required to determine the amounts due claim-

ants, and certify the same to the Secretary of the Treasury, who must, upon presentation of the certificates of the Secretary of State, pay the amount so found due.

After the payment was made into the Treasury of the United States, a controversy arose between the receiver of the Limited Company and the Orinoco Iron Company as to who was entitled to the fund and the latter sought to have the payment made to it on the ground that the Limited Company, not having suffered the loss, was not the owner of the claim. The Secretary of State refused to recognize the claim of the Orinoco Iron Company and directed the payment of the money to the Limited Company and to other persons designated by it, and sent certificates to the Secretary of the Treasury for such distribution.

The Court of Appeals of the District of Columbia sustained the claim of the appellee, holding that the certificate of the Secretary of State did not interfere with the power of the court to declare the appellee entitled to an equitable lien on the fund and overruled the contention of the Secretary of the Treasury that his duty was merely ministerial and that he must carry out the certificate of the Secretary of State. The dissenting opinion states that the Secretary of the Treasury could not be enjoined from carrying out the determination which the Secretary of State was vested with final and exclusive power to make, especially as the Secretary of the Treasury was directed by the statute to make payment in accordance with that determination. In fact, the dissenting Judge said:

"If the Secretary of the Treasury may be enjoined from paying the moneys to the beneficiaries, it is not apparent why mandamus would not lie to compel payment to the plaintiff." (p. 226)

He went further and stated as follows:

"Indeed, if it be true that the Secretary of the Treasury can be enjoined from making the payments directed by the Secretary of State, then, as a corollary of that proposition, it would seem that the findings of the Secretary of State may be controlled and directed by the judicial department of the government,". (p. 226)

The majority of that court did not agree with his contention, and the holding of the majority was affirmed by the United States Supreme Court in *Mellon v. Orinoco Iron Co.*, 266 U. S. 121.

The statute in the *Orinoco* case seemed possibly to authorize the Secretary of State in his discretion to determine the amounts due claimants respectively from each of such trust funds (to wit, the trust funds represented by monies received from foreign governments).

In the present statute, no such discretion is vested in the Secretary. When he receives from the Commission copies of the awards, it is his duty to certify the same without further question and, therefore, as held in *Perkins v. Elg* (307 U. S. 325), he is subject to a declaratory judgment as to the rights of the various claimants to the Special Deposit Fund.

That the Secretary of State in certifying was performing a purely ministerial function, is demonstrated by the fact that he is frequently called upon to certify to the Treasury Department international awards. A recent example occurred in the case of the creation of a commission under the Convention between the Mexican Government and the United States Government in relation to claims of American citizens against the Mexican

Government (*American-Mexican Claim Bureau v. Morgenthau*, 26 Fed. Supp. 904).

As appears from that case, Congress passed an Act "relative to determination and payment of certain claims against the Government of Mexico" in Section 4 of which Act (50 Stat. 783, c. 758), it was provided that "upon the certification to the Secretary of the Treasury of the awards of the Special Mexican Claims Commission, he shall proceed to make payments as provided for in section 9 of the Act approved April 10, 1935."

By the last mentioned Act (Act of April 10, 1935, 49 Stat. 149, c. 55), the Commission was required to report to the Secretary of State "a list of all claims allowed in whole or in part, together with the amount of each claim and the amount awarded by the Commission". The Secretary of State in turn was "required to transmit a certified copy of the list of claims allowed to the Secretary of the Treasury".

Certainly, the certification of a list is nothing but a ministerial act and not the performance of a judicial function. Consequently, it follows that when the language of a statute such as in the case before the court requires certification on the part of the Secretary of State, it should not be deemed the performance of a judicial function unless special language is used to indicate that such was the intention.

(d) *A fortiori* is such a certificate not controlling when made with knowledge of contemplated resort to the courts and after actual filing of the bill.

It is claimed by the respondents that because the Secretary of State certified the awards to the Treasury Department before he was actually served with process, the suit had become moot as to him. This contention was sus-

tained by the District Court. In other words, the respondents claim that because the Legal Adviser to the Secretary of State frustrated attempts to serve the complaint until after the certificates were actually signed (R. 318), petitioners lost their right. The complaint was filed at 9:05 A. M. on October 31, 1939 (R. 302), served upon the Secretary of Treasury at about 9:35 A. M. and upon the Legal Adviser to the Secretary of State at 3:15 P. M. on that day (R. 302, 332). Prior to the service upon said Legal Adviser, the Marshal attempted to serve process and was advised to return the next day, but ignoring such advice, he succeeded in effecting service in the afternoon of the same day (see Affidavit of Administrative Assistant, Legal Adviser's Office, Department of State, R. 318). In the meantime, between 9:05 A. M. and 3:15 P. M. these awards, 153 in number, were certified (R. 318).

In view of the fact that the Department of State was on June 23rd and October 25th, 1939 duly notified of the intention of the petitioners to bring the suit (R. 303-317), this evasion of service of process on the part of the Department of State (R. 318) does not deprive the petitioners of their rights.

If their suit is meritorious, the petitioners are entitled to have the *status quo* restored as of the time of the commencement of the action (*Texas & N. O. R. Co. v. Northside Belt Ry. Co.*, 276 U. S. 475). There Mr. Justice Brandeis said (at p. 479):

"For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the *status quo*. *Tucker v. Howard*, 128 Mass. 361, 363; *Town of Platteville v. Galena & Southern Wisconsin R. R. Co.*, 43 Wisc. 493, 506-507."

An action is commenced by the filing of the complaint (Federal Rules of Civil Procedure, Rule 3). Therefore, the statement that the service of process was "too late" is completely unjustified.

The very speed with which the awards were certified indicates that the Secretary of State was not exercising a judicial function.

III.

The Commission made no awards in favor of the sabotage claimants, because, after the retirement of the German Commissioner, the Commission no longer existed.

The Commission made no awards in favor of the sabotage claimants, because, after the retirement of the German Commissioner, the Umpire and the American Commissioner were not authorized to function, and their so-called awards were nullities. This follows the principles of international law, the terms of the agreement creating the Commission, and the rules adopted by the Commission.

(a) *The awards were nullities under international law.*

While a private party's withdrawal at will from an arbitration was recognized at common law (*Russell on Arbitration & Award*, 43; *People ex rel. The Union Ins. Co. of Philadelphia v. Nash*, 111 N. Y. 310). Statutes have, on the ground of domestic public policy, since taken away the right (*Sturges, Commercial Arbitrations and Awards* (1930) §33). But no such change has taken place as to international tribunals, the parties to which are sovereign powers; and the power to withdraw has always been recognized.

To the student of international affairs and the science of government, adherence to this principle has always seemed highly desirable since the effect of an award *in invitum* may be likely to aggravate the relations between otherwise friendly governments and serve no useful purpose.

(b) *Under the terms of the agreement.*

The power of a Commissioner to resign, and the procedure to be followed in that contingency, are provided by the terms of the agreement between the two Governments.

The agreement creating this Commission was made pursuant to the Treaty of Berlin which provided that the United States should have "the rights and advantages stipulated" in Part X of the Treaty of Versailles (42 Stat., par. 2, p. 1939), which in turn provided for the creation of "Mixed Arbitral Tribunals" (Part X, Article 304). This means that the tribunal was to consist of at least one national of each of the High Contracting Parties, Germany and the United States, so that, if one of the Commissioners resigns, the tribunal can no longer function, and especially must this be so when, as in this case, the remaining Commissioner and the Umpire were both Americans.

That it never was contemplated that the Commissioner of one of the Governments and the Umpire, no matter what his nationality might be, could be considered as the Mixed Commission is apparent not only from the treaty but from the terms of the agreement negotiated pursuant thereto. Article II of the agreement creating the Commission provides:

"The Government of the United States and the Government of Germany shall each appoint one com-

missioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him" (Appendix, p. ii).

The very instrument which created the Commission therefore contemplated the actual participation of a Commissioner appointed by each Government as an essential condition of the performance of its mandate and above all of the making of awards.

The power to arrest the further functioning of a commission so constituted is well recognized. With respect to a Mixed Commission sitting under the Jay treaty, Judge Moore says:

"A controversy arose in the proceedings of the London commission under Article VII of the Jay treaty as to the power of the commission to decide whether it possessed jurisdiction of claims on which a final decision had been rendered by the lords commissioners of appeal—the highest court of appeals in prize cases. In order to prevent the commission from acting on this question, the British commissioners asserted a right to withdraw from the board, the treaty requiring at least one of the commissioners on each side and the fifth commissioner to be present at the performance of any act appertaining to the commission. In this way the progress of the board was brought to a halt." (VII Moore, Digest 33.)

Similarly, the Mixed Arbitral Tribunal of Hungary and Roumania ceased to function when Roumania or-

dered its national judge to withdraw from that Commission (*Collection of Opinions, Articles and Reports bearing upon the Treaty of Trianon, etc., Vol. II, by Dr. Vallotton of Lausanne, a member of the "Institut de Droit International" and former President of the American-Norwegian Mixed Arbitral Tribunal, p. 231*).

(c) *Under the rules adopted by the Commission.*

With the consent of both Governments, the Commission adopted rules of procedure.

Under the rules so adopted and still unaltered at the time of the retirement of the German Commissioner, the Umpire could act only upon *written* certification by both Commissioners that they were in disagreement. Article VIII, subd. (a) of the Rule VIII of the Commission provides:

"(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified" (Appendix, p. v).

A similar provision in an international arbitration agreement was held to be mandatory on the tribunal. Thus, where arbitrators in a certain arbitration with Spain differed, and sought the opinion of the Umpire, Count Lewenhaupt, as to the meaning of Article I providing that the Umpire "shall decide all questions upon which they shall be unable to agree", he held:

"The functions of the umpire are limited by Article I of the agreement to the decision of questions upon

which the arbitrators are unable to agree, and which they submit to him for decision. * * *

"* * * if one of the arbitrators refuses to certify the disagreement, the case cannot again come before the umpire under the agreement of 1871'" (3 *Moore, Arbitrations* 2192).

But in the present case there was even a greater limitation on the powers of the Umpire. He could decide on matters about which the Commissioners were in disagreement only after such disagreement had been certified to him in writing.

The awards of the Commission, as demonstrated by its Report of Opinions and Decisions, show that many decisions and awards were granted by the two Commissioners without calling in the Umpire by a certification of disagreement. Therefore, the conduct of the Commission demonstrates beyond a doubt that the agreement between United States and Germany did not create a commission of three persons, but a commission of two, with authority on the part of the Umpire to function only in case of disagreement.

In the *Greco-Turkish Agreement of December 1, 1926* (Permanent Court of International Justice Advisory Opinion No. 16 (August 28, 1928), Public Ser. B., No. 16, pp. 20, 21), the following clause appears:

"Article IV.—'Any questions of principle of importance which may arise in the Mixed Commission in connection with the new duties entrusted to it by the Agreement signed this day and which, when that Agreement was concluded, it was not already discharging in virtue of previous instruments defining its power shall be submitted to the president of the Greco-Turkish Arbitral Tribunal sitting at Constantinople for arbitration. The arbitrator's awards shall be binding.'"

This clause gave rise to differences of interpretation regarding conditions for appeal to the arbitrator, and these differences were submitted to the Permanent Court of International Justice at The Hague for an advisory opinion. *The court held that while the two national commissioners could decide when questions of principle of importance arose, the president could act only when the two national commissioners decided that the matter was a question of principle.*

Applying this decision to the present case, it is obvious that the Umpire, in the event of disagreement, could function only after receiving a written certificate of disagreement signed by the Commissioners who essentially constituted the Mixed Claims Commission.

Subdivision (d) of rule VIII of the Rules reads as follows:

"(d) All decisions shall be in writing and signed by (1) the Umpire and the two National Commissioners, or (2) by the two National Commissioners where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based." (Appendix, p. 5.)

By the terms of this subdivision as well as by the terms of subdivision (a) (p. 47, *supra*), the Umpire may function "*alone*" only "when the two National Commissioners have certified their disagreement to him".

On March 20, 1929, special additional rules applicable to the sabotage cases were adopted by the Commission, one of which reads as follows:

"The Umpire will sit with the National Commissioners throughout the argument."

This amendment does not modify or affect the rules earlier made by the Commission and certainly does not change the rules with regard to its decisions.

In 1931 the sabotage claimants objected to Umpire Boyden joining with the two National Commissioners in the decision and opinion rendered in October 1930, but the Commission, in its decision, stated that this was no departure from the rules. In fact, the concurrence of the Umpire in the opinion of the two National Commissioners is in direct compliance with subdivision (d) quoted above, and it changes neither the rules of the Commission as to *disagreements* between the National Commissioners and the power of the Umpire to pass upon those disagreements after a written certificate as required by subdivision (a) above, nor does it convert the Commission into a Commission of three as in the *Cauca* case (*infra*).

The case of *Colombia v. Cauca Company*, 190 U. S. 524, is relied upon by the respondents. In that case, Colombia, having seized the railroad of the Cauca Company, entered into an agreement with the United States, by which the validity of its seizure was recognized in return for its agreement to pay whatever the commission should find to be due claimant. The Republic of Colombia submitted its differences to arbitration. The action was brought to set aside the award in favor of the defendant. The defendant filed a cross-bill to confirm the award. The agreement of submission provided that three members were to constitute the commission which was itself to act as a unit and to prescribe its own rules of procedure. *The commission with the consent of all parties adopted a rule that its decisions might be made by a majority vote.* After the defendant's claim had been fully heard on the merits by all three members, after voluminous evidence had been considered on the merits

by all three members, after the *quantum* of the award had been carefully determined by the acceptance of certain items of damage and the rejection of others by all three members, and "at the end of the trial, when hardly anything remained to be done except to sign the award, the questions remaining open concerning only matters of interest", one of the commissioners resigned. Under such circumstances, the court upheld a majority award, but proceeded to disallow two items of damage as in excess of the commission's jurisdiction, to wit: (1) a \$135,000 item for cash paid by the claimant to purchase the railroad concession and (2) a \$29,200 item voted by the claimant to its officers for services in securing the agreement of submission. Mr. Justice Holmes succinctly stated (at p. 580):

"It is for us to determine the scope of the commission, whatever may have been its own finding with regard to its powers."

The case is therefore clear authority for the court's power to review the propriety of a tribunal's action in determining its own jurisdiction, if its award is *ultra vires*, and likewise indicates that the alleged sabotage awards were *ultra vires*, as is evident by contrasting that case with the situation at bar:

(1) There the commission was to act as a unit and decide by majority vote; here the two commissioners acted if in agreement, and the Umpire could function only on a certification of disagreement, signed by both commissioners;

(2) There the retirement of one of the three commissioners would have necessarily frustrated the submission because of a time limit in the submission agreement, no provision being made for the appoint-

ment of a successor; here there was no time limit and the submission agreement itself provided the mechanics for the appointment of a successor;

(3) There the awards had already been heard and decided on the merits at the time of retirement—even the amount of the damage had been decided (with the exception of an interest item) after a full presentation directed squarely to the items of possible damage; here there had been no hearing or decision on the merits and specific reservation for some future time of the merits and the *quantum* of the damage, if any; all that was then pending was a motion to reopen a dismissal made nine years before on the merits;

(4) There the commission had yet to take merely formal action on the claim; here the commission was *functus officio* by the dismissal of the claim on the merits nine years ago.

(d) *An award not within the jurisdiction or power of the Commission is a nullity.*

In Administrative Decision No. II, Judge Parker ruled that the Mixed Claims Commission between the United States and Germany was a tribunal of limited jurisdiction. He said (p. 5):

"This Commission was established and exists in pursuance of the terms of the Agreement between the United States and Germany dated August 10, 1922. Here are found the source of, and limitations upon, the Commission's powers and jurisdiction in the discharge of its task of determining the amount to be paid by Germany in satisfaction of her financial obligations to the United States and to American nationals under the Treaty of Berlin."

Oppenheim, International Law, 5th Ed., Vol. 2, page 28, in stating the principles by which International arbitration is governed, says:

"The first is that their jurisdiction is essentially grounded in the will of the parties as expressed in the *compromis* or in the general arbitration treaty, and that an award rendered in excess of the power conferred upon them is null and void as having no legal basis whatever."

Ralston, The Law and Procedure of International Tribunals, §51, pages 42, 43, likewise says:

"51. JURISDICTION TO GRANT PARTICULAR RELIEF—The third question involved in the application of the word 'jurisdiction' is, had the court the right to grant the particular award asked for or given by it in the case before it? In the nature of things, arbitral courts have very rarely so far exceeded their acknowledged power in this regard that their actions have been the subject of later challenge. Nevertheless cases of having done so, exist.

"In the judgment of the United States, the King of the Netherlands exceeded his power as an arbitrator and undertook to act as a mediator in the case of the Northeastern Boundaries. This country, therefore, refused to carry out the decision as it constituted a departure from the powers of the arbitrator, and Great Britain joined in waiving the award. The same assertion was made as to the award in the *Chamizal* case with Mexico.

"The direct point we have under consideration was presented to the Hague Permanent Court of Arbitration in the *Orinoco Shipping Company* case. By the treaty referring this, according to the opinion of the court, Venezuela and the United States had 'at least implicitly agreed', that 'vices involving the nullity of an arbitral decision, were excessive exer-

eise of jurisdiction and essential error in the judgment (*exceso de poder y error esencial en el fallo*), and the United States had alleged excessive exercise of jurisdiction and numerous errors in law and fact equivalent to essential error. The court remarked that,

'excessive exercise of power may consist, not alone in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of the law to be applied.'

"It has rarely been possible for local courts or any other bodies to review international awards with the idea of determining whether or not the arbitral court had exceeded its power in granting the award. Nevertheless such an occasion arose in the case of *Colombia v. Cauca Company*. In this case the Supreme Court of the United States said:

'The main and serious question of the case is whether the scope of the submission was exceeded by any items of the award. * * * The only fair way is to take the language (of the arbitral agreement) in its natural sense, not straining it either way. * * * It is for us to determine the scope of the commission, whatever may have been its own finding with regard to its powers. When its powers are established we are not called upon to revise any finding that could have been made without going beyond the line which we lay down.'

Lammasch, "*Handbuch des Voelkerrechts*", *Schiedsgerichtsbarkeit*, pages 212, 213, thus states the rule:

"If the arbitrator exceeds his powers, his verdict is null and void as an award, * * *." (Translation.)

Ralston in an article on *International Awards* uses the following language (Va. Law Review, Vol. 15, p. 8):

"It must be recognized that an award which goes beyond the terms of the compromis is, to such extent, null and void. It was the belief of the United States in the case of the Northeastern Boundaries that the King of the Netherlands exceeded his power as an arbitrator and undertook to act as mediator. The United States, therefore, refused to carry out the decision as a departure from the powers of the arbitrator, and Great Britain joined in waiving the award." (Italics ours.)

In view of the principle thus authoritatively established and repeatedly applied, it is clear that the so-called award of 1939 in favor of the Sabotage Claimants constituted a usurpation of powers to which the following passage in an article by the Norwegian Professor Castberg, *L'Exces de Pouvoir dans la Justice Internationale Academie de Droit International, Recueil des Cours, 1931, I, p. 448*, is directly applicable:

"If there has been a usurpation of power, the so-called 'judgment', pronounced by the judge, has in reality no value as judgment. It is absolutely void. It is non-existent from a juridical point of view." (Translation ours.)

Castberg, *supra*, also in the same article says (p. 388) in regard to non-observance of the rules of the Commission:

"An arbitral tribunal may also commit an excess of power by applying to its proceedings rules of procedure differing from those which were prescribed to the tribunal. This disregard of the rules of pro-

cedure does also involve an excess of power." (Translation ours.)

and further page 442:

"If an international tribunal would assume a power without basing it on an agreement between the parties, there would actually be a usurpation of power. The judgment should then be a nullity for the parties. The same would be true if the judgment is only apparently based upon an agreement of the parties—in other words, if the reference by the court to the agreement between the parties is only aimed to cover a usurpation of power. Also in this case the judgment would be a nullity." (Translation ours.)

It is suggested by respondents that the decision of the Umpire as to the extent of his own powers is binding. Aside from the fact that his own decision was not the decision of the Commission, the "Bootstrap doctrine" (53 Harvard Law Review 652) that a decision of a court as to its own jurisdiction is *res adjudicata*, has no application here. Such decisions as *Stoll v. Gottlieb*, 305 U. S. 165 and *Chicot-County Drainage Dist. v. Baxter State Bank*, 60 Sup. Ct. 317, rest upon the age-old doctrine that courts of general jurisdiction, such as federal courts in bankruptcy, have the power "to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act" (60 Sup. Ct. at 319).

The doctrine of *Stoll v. Gottlieb* cannot apply to an arbitral tribunal which derives its charter from an agreement between two governments. Such a tribunal is no more a court with broad inherent powers than is a private arbitral tribunal; and it is elementary law that in a private arbitration the arbiters cannot go beyond the terms of the submission. In other words, a mixed arbitral

tribunal cannot, by its fiat, extend its jurisdiction. A federal district court, though in one sense a court of limited jurisdiction, is not regarded as an inferior court (15 C. J. 722). Within the boundaries of its jurisdiction it has certain inherent powers. But no such inherent powers can be ascribed to a mixed arbitral tribunal, which, as an international tribunal, has no power beyond that which has been specifically delegated to it by the sovereignties which created it.

(c) *There was no such disagreement as to authorize the Umpire to function as such, even if the mixed commission had not ceased to exist.*

Respondent-intervener contends that there had been a disagreement of the commissioners such as authorized the Umpire to function under the terms of his mandate, but the contrary appears from the correspondence.

By a letter of March 1, 1939, the German Commissioner addressed to the Umpire, Justice Roberts, a letter apprising the latter of his retirement (R. 145). Had he stopped here and said no more, we hardly see how, under the terms of the treaty, his retirement could have been contested, to say nothing of treating it as if it had not been made. Nevertheless, he went on to give his reasons, the substance of which was that he was convinced that the Umpire was not acting impartially. Usually an umpire does not sit with the commissioners, but we may assume that he is at liberty to do so if they desire it. Such a procedure might even have its advantages, if the umpire should limit himself to trying to bring the commissioners together; but this object would be worse than defeated if he sought, by siding with the one, to coerce the other. In the present instance the Umpire, by *expressing* or *committing* himself to a final conclusion before the Commissioners had put their respective opinions in definite

and final written form practically invited the retirement of the German Commissioner.

This view is justified and confirmed by the letter of the United States Commissioner, Mr. Garnett, of March 3, 1939 (R. 150), in which he explicitly states that at the last meeting it was "agreed that we should proceed to examine the whole record to determine whether, upon the whole record, the American case has been proven", and that it was while they were examining this question that the German Commissioner retired. This seems to be destructive of the theory later advanced by Mr. Garnett that the German Commissioner's withdrawal is to be treated as ineffective because it prevented them from rendering a decision on opinions finally arrived at and stated (R. 178). It also completely undermines the assertion that when Umpire Roberts assumed to make an award, he had before him that final disagreement of the Commissioners which was essential to his exercise of the power to decide.

What we have here stated is furthermore confirmed by the last two paragraphs of Commissioner Garnett's letter to Mr. Hull, Secretary of State, of March 3, 1939. The paragraph next to the last expressly states that the subject of the conference between the Commissioners and the Umpire on February 28 and March 1, 1939, was whether the evidence adduced to prove that the Hamburg award was induced by fraudulent testimony was sufficient for that purpose (R. 151). The last paragraph reads as follows:

"After the conference had extended for a considerable time, the Umpire expressed himself in entire agreement with me on this proposition. Thereupon the German Commissioner argued that, if upon an examination of the whole record both before and

subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, the petition would have to be dismissed, and he urged upon the Umpire and myself that we should consider the whole evidence for that purpose. We thereupon proceeded to examine the whole record to determine from that record whether the American case had been proven. It was while the Commission was engaged in examining this question that Dr. Huecking's action in regard to his retirement was taken" (R. 151).

The foregoing paragraph, it will be observed, expressly admits that, when the German Commissioner retired, the Commissioners and the Umpire were engaged in examining "the whole record to determine from that record whether the American case had been proven," and that "it was while the Commission was examining this question" that the German Commissioner retired (R. 152).

To claim, on the face of this statement, that, when the German Commissioner retired, there was a final disagreement such as justified the Umpire in proceeding to make an award, is in effect to concede the German Commissioner's contention that the United States Commissioner, to say nothing of the Umpire, was not participating in the deliberation with an open mind. Nor would this aspect of the matter be mitigated by the retort that the German Commissioner was not participating in the examination of the record with an open mind. Dealing with the case as it stands, the material thing is the fact that, as the Commissioners and the Umpire, when the German Commissioner retired, were, according to the American Commissioner's own recorded admission, engaged in an examination of all the evidence with a view to determine

what their eventual position should be, it is not possible legally to defend the contention that the Umpire's award was rendered upon such a disagreement between the Commissioners as the arbitral agreement contemplates.

A court, consisting of several judges, never reaches a stage of disagreement simply because varying views are expressed during a discussion or consultation concerning the case before the court.

(f) Frustration by retirement could not give consent.

It is claimed that the work of the Commission was frustrated by the German Commissioner and that this frustration was equivalent to a consent that the remaining members should decide all issues.

Such a claim is legally unjustified. There certainly is nothing in the treaty that either directly or by implication empowers one of the Commissioners and the Umpire to sit in judgment upon the retirement of the other Commissioner, and still less is there anything to warrant the assumption that the Mixed Commission may, under any circumstances, be said to consist of the Commissioner of only one of the parties and the Umpire. In this connection attention may be called to the fact that the Commission's rules of procedure speak of the "two national commissioners" who are to certify disagreements or points of difference to the Umpire. This language merely accentuates the fact that a "mixed commission" between two countries is fundamentally thought of as comprising an appointee or appointees of each of the contracting parties. No doubt either party might, should it see fit to do so, appoint as its Commissioner a citizen of another country. As regards its appointee, each contracting party may freely make its own selection; but, in order that an arbitral tribunal may function as a

mixed commission, each party must be effectively represented on it by its own appointee.

By the express terms of the agreement which constituted the Mixed Claims Commission there need not have been any Umpire, if the Commissioners had always agreed, thus emphasizing the fact that the two Commissioners were the *essential constituents* of the Mixed Commission. Obviously, an umpire cannot be considered as a national representative, it being his function to exercise an impartial judgment and to this end he is not to be regarded as the representative of either of the contracting parties. Constitutional powers are derived from the charter under which they are exercised, and the theory that they may be derived from or expanded by the alleged misconduct of one of the parties to the agreement is, we believe, altogether new.

IV.

The Commission made no awards in favor of the sabotage claimants, because the Commission was *functus officio* and not empowered to grant a rehearing.

- (a) *The Commission, after it had made an award, had no power to substitute for it a new and different award unless with the consent of both sovereigns.*

The facts of this case furnish justification for the rule that a final award is subject to revision only with the express consent of the contesting sovereigns.

On October 16, 1930, the Commission dismissed the sabotage claims (R. 224, 260), remarking that fraud and perjury permeated the evidence adduced by both sides (R. 261-265); and on March 30, 1931 and December 3, 1932, applications for rehearing were also dismissed (R. 225).

More than nine years later, on October 30, 1939, after two applications for rehearing were denied, the Commission, with a new personnel, including a third successive Umpire, granted a rehearing on the ground of fraud, although that allegation was dealt with in the original dismissal (R. 261-265).

Submission to arbitration should not and does not subject the contracting sovereigns to successive rehearings and reopenings of awards.*

It casts no reflection on any umpire or any commissioner to say that such a practice would be fraught with the possibility of grave abuse and would put the entire system in peril. If each successive commissioner or umpire could reopen and retry what his predecessor had done, chaos would readily ensue, and there would be no end of litigation or any consistence or certainty in it. While this rule prevails in private litigation it is even more important in the international sphere in which the parties to the process are independent and sovereign states.

The authorities are clear that a final award may not be set aside or a new award made without the consent of both sovereigns.

In *Hyde on International Law* (Vol. 2, p. 157) the rule is thus stated:

"The decision of an international tribunal over matters as to which it is made the supreme arbiter

* In private arbitrations when an award has been delivered the arbitrators have no power to rejudge the case or alter the award nor perfect it by executing a supplemental award. *Flannery v. Sahagian*, 134 N. Y. 31, 31 N. E. 319; *Hérbat v. Högnaers*, 137 N. Y. 290, 33 N. E. 315. If the original award was procured by fraud, it may, under certain circumstances, be set aside by a court; but the arbitrators have no power to render another award in the absence of a resubmission, and in the absence of statute, the resubmission must be by the parties themselves (*Sturges: Commercial Arbitrations and Awards*, page 805, and cases there cited in note 146).

is said to be final, and not the subject of revision, except by the consent of the contesting sovereigns."

In the *Cerruti* case (*Italy v. Colombia*), 10 Rev. du Droit Pub. 523, 526, President Cleveland was the arbitrator. The Colombian Government protested against Article 5 of the award. Secretary of State Sherman replied to the Colombian Minister, May 9, 1897 (For. Rel. 1898, pp. 250, 251):

"The President of the United States, whether he be the individual who acted as arbitrator or his successor in office, became, under any circumstances, *functus officio*, so far as the arbitration was concerned, upon the rendition of his award, and could not undertake to reopen the arbitration and reconsider the award under any just view of the powers conferred upon him as arbitrator by the protocol under which he acted. Should the parties to the arbitration invite the reconsideration of the award in question, in whole or part, or request its interpretation in any respect, that could only be accomplished by a new submission and arbitration."

To this effect see also *Claim of Manuel de Cala*, 2 Moore's International Arbitrations, 1273-4.

In the *Claim of Benjamin Weil*, 2 Moore's International Arbitrations 1324, 7 Moore's Digest 63-8, an award in favor of claimant Weil had been made by the United States and Mexican Claims Commission of 1868.

Upon an application for rehearing the Umpire refused the motion on the ground, as stated in Moore's Int. Arb., Vol. II, page 1329:

"* * * (1) that he had no right to consider any evidence besides 'that which had already been before the commissioners, had been examined by them, and transmitted to the umpire'; (2) that, as he had already examined that evidence with all the care of

which he was capable, it was not likely that a re-examination of it would alter his opinion; (3) that as his decisions had, without his wishes being consulted, been made public, and as they were known by the convention to be final and without appeal, it was probable that they had been made the basis of transactions which an alteration or reversal of them might seriously prejudice; and (4) that, in his opinion, the provisions of the convention in effect debarred him from rehearing cases which he had already decided, and deprived each government of the right to expect that any claim should be reheard." (Italics ours.)

In *Frelinghuysen v. Key*, 116 U. S. 63, which was an action by the assignee of part of the *Weil* claim to mandamus the Secretary of the Treasury to pay the award, Chief Justice Waite of the Supreme Court said at page 72:

"As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two governments, or otherwise. Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not now seek to do."

This language was approved in *Boynton v. Blaine*, 139 U. S. 306, 321-2 (1891).

In *Ralston, The Law and Procedure of International Tribunals*, §371, pages 207-8, the following is stated:

"371. *Rehearings and revision*.—Rehearings have been repeatedly refused by umpires, either of their own decisions or of those of their predecessors, such being also the stand taken by the commission appointed pursuant to the treaty of Guadalupe Hidalgo, and it being said by Baron Blanc of the Spanish-American Claims Commission that he did not con-

sider himself 'empowered to review the formal decisions of the precedent umpires, such decisions being essentially definitive, according to international usages.' "

Nor has there been a single instance in which the present Mixed Commission, when legally constituted and actually existing, set aside or revised its awards, except "on agreed statements, recommending awards, signed by both the German Agent and the Agent of the United States" (R: 93).

In the *American Journal of International Law* of January, 1940, pages 23 *et seq.*, at page 34, Mr. L. H. Woolsey, a former solicitor of the Department of State, who is now counsel for one of the sabotage claimants, referring to the decision of June 15, 1939, stated as follows:

"The significance of this decision in international law is that it is the first instance known to the writer in which a decision of an international tribunal obtained by fraud, collusion, and suppression of evidence by witnesses of one of the parties has been reopened and reheard by the tribunal itself." (Italics ours.) *

On this article, Professor Thomas E. Baty, a British authority on international law and legal adviser to the Japanese Foreign Office (May 1940 *Journal of International Law and Arbitration* (Japanese), Vol. 39, No. 5, page 5, in English), makes the following comment:

"Mr. L. H. Woolsey recurs to the topic of the Reopening of Arbitral Awards (American claims

* This article refers to "fraud, collusion and suppression of evidence by witnesses of one of the parties" but we direct the Court's attention to the fact that in the decision of October 16, 1930, the Commission found that both sides had been guilty of fraud and perjury, and in the decision of December 3, 1932, Umpire Roberts found fraud, fabrication and suppression of evidence by witnesses on behalf of the sabotage claimants. (Dec. & Op., p. 1010 *et seq.*)

against Germany) which he regards as a step forward in the history of International arbitration. It may, however, be legitimately thought that nations will hesitate to conclude arbitration agreements if they are thereby clothing their arbitrators with a wide power to define their own authority."

As regards the finality of decisions, Article VI of the Agreement between the United States and Germany of August 10, 1922, creating the Mixed Claims Commission, expressly provides that "The decisions of the Commission and those of the Umpire (in case there may be any) shall be accepted as final and binding upon the two Governments." Accordingly, the rules enacted by the Commission do not provide for a rehearing, nor did the Commission, when legally constituted and actually existing, ever grant a rehearing.

In *U. S. on Behalf of Philadelphia—Girard National Bank*, Op. and Dec., page 939, the Commission, referring to a claim previously dismissed, said (p. 940):

"Although the rules of this Commission, conforming to the practice of international Commissions, make no provision for a rehearing in any case in which a final decree has been made, this Petition and the supporting Memorandum and evidence have been carefully considered by the Commission."

To the same effect see: *U. S. on Behalf of S. Stanwood Meuken v. Germany*, Op. and Dec., page 837; *U. S. on Behalf of Knickerbocker Insurance Co. v. Germany*, Op. and Dec., pages 912, 914.

Many of the awards of the Mixed Claims Commission were accordingly made by the two Commissioners without calling in the Umpire who was authorized to function only after a certification of disagreement. The decisions thus made are final and binding, and it would be contrary

to the terms of the agreement if such awards were reopened by a fresh disagreement and a calling in of the Umpire.

Furthermore, as above pointed out, the Mixed Claims Commission is a court of limited jurisdiction with only such powers as are granted by the agreement creating it. It has, therefore, no inherent powers. It is in this respect similar to inferior courts with limited jurisdiction as to which it has been frequently held that without specific statutory grant they have no power to grant a new trial. *Williams v. The Trademen's Fire Insurance Co.*, 1 Daly 437; *Hecht v. Mothner*, 4 Misc. 536; *Arellano v. Chacon*, 1 N. Mex. 269; *Warren v. African Baptist Church*, 50 Miss. 223, 227.

(b) *Germany never consented to a new award.*

The alleged consent upon which respondents rely was not given by Germany or the German Commissioner. It was nothing more than a statement on oral argument by the German Agent in 1932, instantly repudiated by the German Commissioner in his written certificate to the Umpire, and recognized by the Umpire himself to have been repudiated by Germany in 1933. Thereafter, Germany consistently and insistently took the position that it had not and did not consent to any such power in the Umpire.

The facts are as follows:

After the first petition for rehearing on the original record had been denied, the Commission of its own motion by letter to each Agent raised the question of its jurisdiction to receive newly discovered evidence. In the brief filed in reply, on April 27, 1931, "the German Agent took the position that the Commission was without jurisdiction to reopen any case in which it had once rendered

a decision" (R. 86). On July 1, 1931, a supplemental petition together with new evidence was filed (R. 86). There was oral argument on this petition in Boston in 1931 and in Washington in November 1932. It was upon the occasion of this argument, in November 1932, in answer to the Umpire's inquiry, that the German Agent stated that the determination of its own jurisdiction was a justiciable question within the power of the Commission to determine (R. 87). On November 28, 1932, the National Commissioners certified their disagreement to the Umpire on all questions involved (R. 88)

"except that the German Commissioner takes the position that the question of the jurisdiction of the Commission to reexamine any case after a final decision has been rendered is *not* a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate." (Italics ours.)

The opinion of the Umpire, holding the new evidence insufficient to justify a rehearing (R. 225), recognized that there had been no consent to his authority to determine jurisdiction and refrained from passing upon any such question (R. 227):

"The German Commissioner's position is that while the two Commissioners by mutual agreement may reopen in such a situation, they may not do so where, as here, one of the Commissioners opposes the reopening. The German Commissioner does so oppose in this case. The conclusions I have expressed make it unnecessary to pass upon the question just stated."

A third petition for rehearing was filed by the American Agent on May 4, 1933. The German Ambassador promptly wrote the State Department that (R. 90, 228):

"The German Government * * * considers petitions

for rehearing in conflict with existing treaty provisions, * * * The German Government regards the commission as being without authority to pass upon a difference of opinion which may exist between the two governments in this connection.

* * * He [the German Commissioner] has no authority to act with respect to the petitions offered by the American Agent * * * ."

The State Department took the contrary view and instructed its Agents to obtain "the decision of the Umpire on this disputed point" (R. 90), i. e., to ask the Umpire to determine the Commission's jurisdiction *in invitum* the German Government.

Prior to December 15, 1933, there were submitted to the Umpire two opinions of the American Commissioner and two opinions of the German Commissioner together with a letter of the then acting German Agent Lohmann, in which letter the following excerpt from the minutes of the meeting of October 30, 1933, was quoted (R. 229):

"it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Umpire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government before the Commission."

On December 15, 1933, Umpire Roberts reaffirmed the Commission's lack of power to reopen the case for after-discovered evidence but affirmed its power to open the case if the former decision had been induced by fraud and collusion (R. 229).

On May 7, 1934, the German Ambassador wrote the Secretary of State (R. 135):

"I should be grateful to Your Excellency if you would advise me that the American Government agrees with the German Government that the Mixed Claims Commission, United States and Germany, shall not be asked in the future to consider new cases or cases already decided except the sabotage cases * * *"

to which the Secretary agreed (R. 137).

The mere fact that in May, 1934, by exchange of notes, it was mentioned that the sabotage claims were still pending, does not signify any consent on the part of the German Government that the Commission had jurisdiction to rehear the claims.

On July 29, 1935, on the certificate of disagreement, the Umpire held the proceedings limited to a petition for rehearing and not on the merits, stating:

"* * * The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing.

It is, of course, conceivable that the Commission should hear argument on both the propriety of reopening the case and the merits at one and the same time. Much may be said pro and con on such a procedure. Nevertheless, I suppose that if the parties were in agreement that this course should be followed, the Commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon

the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits."

On June 3, 1936, the Commission unanimously set aside its decision of December 3, 1932 dismissing a petition for rehearing, and entertained a petition for rehearing, stating (R. 140):

"Before the Hague decision [the original awards] may be set aside, the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits. Both parties are entitled to file evidence (and to exchange briefs) as well in the proceedings in which a ruling for a reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted. Evidence filed and briefs submitted in the proceedings, in which a reopening is sought, must remain within the limitations set by the Commission's Decision dated December 15, 1933."

After a long delay in which settlement negotiations failed, evidence was filed by both sides and the cases orally argued, ending January 27, 1939 (R. 96). Even though the opinions of July 29, 1935 and June 3, 1936 stated definitely that *unless Germany should agree to a different course*, the question whether there should be a rehearing must be determined by a hearing separate and distinct from any argument on the merits, and even though Germany did not agree to such different course, the American Agent renewed his request for a hearing

on the merits in his brief filed September 12, 1938, and in his oral argument in January 1939. To both of these requests, the German Agent answered that *Germany had not agreed to a different course*. On March 1, 1939, the German Commissioner withdrew (R. 145-147), and on June 10, 1939, the German Embassy called the attention of our State Department, with respect to a proposed meeting of the Commission, to its contention that the Commission had ceased to function (R. 100):

"By direction of my Government, I call attention to the fact that since the withdrawal of the German Commissioner, * * *, the Commission has been incompetent to make decisions and that consequently there is no legal basis for a meeting of the Commission at this stage. By direction of my Government, I advise you that the Government of the Reich will ignore the decision to call the meeting on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure."

On June 15, 1939, without having a new trial, the alleged Commission, upon the motion of the American Agent, without any argument, and without notice, directed an award to the sabotage claimants, in the following language (R. 242):

"The Umpire: In view of what appears in the record, and based upon the American Agent's motion, the Commission is prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form. Those may be submitted, and if approved will be made at a further meeting to be called on notice."

It is contended by the respondent-intervener, and in

support thereof there is submitted Martin's affidavit, that the German Agent consented to a decision on the merits.

In the answering affidavit (R. 231-235), it is clearly established that Germany never consented to a decision on the merits even if the motions for reopening were granted.

Again it is claimed that because the German Commissioner requested an examination of the evidence presented by the American side, to determine whether perjury by the American witnesses had been committed to such an extent on the American side that a reopening would not be warranted, Germany had requested a decision on the merits.

There is no warrant for such an inference.

But even assuming the German Agent had consented that the Commission or, in case of disagreement (followed by appropriate certificate), the Umpire should be empowered to grant a rehearing, such consent does not carry with it the power to grant a new judgment without an actual rehearing and the submission by both sides of proofs if so advised. The distinction is well recognized in our law: power to grant a new trial does not carry with it the right to grant a new judgment. It also has practical significance. The effect of a vacatur of the original dismissal would be to leave *both* sovereigns free to take such steps with respect to the claims as their respective sovereignties might deem desirable, unhampered by earlier awards claimed to have been induced by fraud.

The fact remains that Germany never consented to the rendition of new and different awards in a manner never contemplated by the terms of the submission; and the Congress never intended to appropriate funds to the payment of any alleged awards under the circumstances here disclosed.

V.

The shares of stock of Agency of Canadian Car & Foundry Company, Ltd., being entirely owned by Canadian Car & Foundry Company, Ltd., a Canadian national, the Commission had no jurisdiction to grant it any award.

Petitioner contends that, as the Commission's jurisdiction is limited to claims of United States nationals, an award to a Frenchman, a Canadian, or any other non-American national, is wholly void, both because it is contrary to the express terms of the agreement, and because it would deprive American nationals of their proportionate share of the special deposit fund out of which awards are paid.

In the case of Agency of Canadian Car & Foundry Co., Ltd., there is no dispute that the shares of stock of the claimant company are entirely foreign-owned (R. 186); we contend that the court cannot obtain jurisdiction by reason of the fact that some of the shares of the parent company are American-owned.

In Administrative Decision No. II (Dec. and Op. Mixed Claims Commission U. S. and Germany, p. 8), the Commission held:

"Original and continuous ownership of claim.—In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership."

Prior to the pronouncement of the American Commissioner and the Umpire in favor of the Agency of Canadian Car & Foundry Company, Ltd., when the Mixed Claims

Commission was legally in suspension, the Commission, legally constituted and validly functioning, uniformly held that awards could be made only in favor of American nationals.

In *H. Herrmann Manufacturing Co.* (M. C. C., U. S. and Ger. Docket No. 173), 95% of the shares of the Company were held by H. Herrmann, Ltd., London, a British corporation. The German Agent contended that the H. Herrmann Manufacturing Co. could not claim before the Commission. The American Agent opposed this contention.

Briefs were exchanged, and the two national Commissioners, unable to agree submitted their opposing opinions to the Umpire. As a result the claim was withdrawn.

In the case of *American Congo Company* (M. C. C., U. S. and Ger. Docket No. 504), an award was made for the amount of \$75,000 by the signing of an agreed statement in which it was said:

"* * * this amount represents American interests in the proceeds of the award that may be entered herein."

In the case of *Gans Steamship Line* (M. C. C., U. S. and Ger. Docket No. 6625), it appeared that 20% of the claim was impressed with German nationality, and thereupon a decision was rendered for

"An award limited to the American interest in this claim. * * * for the use and benefit of such American interest" (Dec. & Op., p. 741).

In *A. Klipstein and Co.* (M. C. C., U. S. and Ger. Docket No. 540), the claimant was a corporation organized under the laws of New Jersey. All of the stockholders were American nationals since February 8, 1917, but one of

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them, August Klipstein, who owned 1140 shares out of a total of 2000 was not naturalized until that day. In view of the particular circumstances of the case, the German Agent was prepared to consider it as sufficient that the claim had been entirely impressed with American nationality prior to the entry of the United States into the war. Solely by reason of these circumstances, was an award granted to the claimant.

In *Lezcano & Company, sucesores* (M. C. C., U. S. and Ger. Docket No. 13787), all of the partners were nationals of Spain. The American Agent said:

"* * * the American Commissioner has informed the American Agent that if a *real American interest other than that of the partnership entity* should be shown to exist in the claimant partnership the Commission would look into the case again." (Italics ours.)

In *Henry Cachard and Herman Harjes* (Dec. and Op. M. C. C., U. S. and Ger., p. 634), claim was made by two executors of an estate, all of whose heirs were of French nationality. The claim was dismissed on the ground that "the entire beneficial interest in the claim is in French nationals".

In *Société du Chemin de Fer de Bagdad* (Dec. of Mixed Arbitral Tribunals, Vol. I, pp. 401-407) the Franco-German Mixed Arbitral Tribunal laid down the following rule:

"Moreover, it is thoroughly in accord with the spirit of the Peace Treaty to pay less attention to questions purely formal than to palpable economic realities; consequently, when the nationality of a corporation is to be determined more weight must be given to the interests represented therein than to

the outward appearance which may conceal such interests. In the present case the circumstances that both corporations are described as Ottoman (Turkish) and that their charter seat is Turkey must be considered as purely formal and not of decisive importance."

In the case of *I'm Alone*, 29 American Journal of International Law (1935), page 326, a tribunal was created under an agreement between Canada and the United States consisting of Justice Van Devanter of the Supreme Court of the United States and Judge Duff of the Supreme Court of Canada, to determine the amounts due Canadian citizens by our Government. The first question was whether the Commissioners could enquire into the beneficial or ultimate ownership of the "I'm Alone" or of the shares of the Canadian corporation that owned the ship. The answer was in the affirmative, and in the final report, the Commissioners decided (p. 330) *that in view of the fact that the beneficial ownership was entirely in citizens of the United States, no compensation ought to be paid in respect of the loss of the ship or the cargo.*

In *Ralston's Law and Procedure of International Tribunals*, Rev. Ed., page 155, the following is stated (citing numerous authorities):

"The mixed commissions sitting by virtue of the Versailles and subsequent treaties have several times rendered decisions upon the general subject.

"Thus, for instance, it has been held that a corporation formed in Germany and controlled by Frenchmen can claim as a victim of exceptional measures of war, a house which has its site for business affairs in Germany, but of which no associate is German, cannot be considered as a German subject * * *"

Furthermore, it has been the practice of the State Department for many years, when requested by a corporate claimant to present and prosecute its claim against a foreign government, to require such corporate claimant to set forth the proportion of American interest in such corporation and to sponsor such claim only to the extent of the American interest. Such was the requirement in connection with claims before the Mixed Claims Commission, United States and Germany, and such was, for example, the requirement in connection with claims for losses or damages sustained in Spain (a rule common to the general claims circular issued by the Department).

We quote the following requirement in connection with the last mentioned claim from the mimeographed circular of the State Department entitled "Statement for the General Information of American Nationals Desiring to Present International Pecuniary Claims for Losses or Damages Sustained in Spain":

.....
Third. If the claimant is an incorporated organization, the date and place of incorporation, and the approximate proportion of the capital stock owned by American nationals or American organizations should be shown. If a claimant organization is unincorporated, the extent of the ownership of such organization by American nationals or American organizations should be similarly shown. See in this relation the attached memorandum A-1."

Said Memorandum A-1 is entitled "Memorandum in Relation to Evidence Necessary to Establish the American Nationality of Corporations, Joint Stock Companies and Partnerships" and contains the following:

"(3) Evidence of the American nationality of each officer and director who is an American citizen. (See

the attached Memorandum A in relation to Evidence Necessary to Establish American Nationality.)"

The question of nationality is jurisdictional.

Burthe v. Denis, 133 U. S. 514.

In that case a claim, French in origin, was presented by France on behalf of the executor of the estate of a French national for the value of the property damaged through occupation by the military authorities of the United States. Some of the heirs of the French national, who had a beneficial interest in the claim, were French citizens, others Americans. The Supreme Court held that the Commission under the express terms of the Convention between United States and France creating it was without jurisdiction to consider the claim of the Americans and make an award in their favor.

If this Court may reject an administrative ruling when it conflicts with established decision (*cf. Estate of Sanford v. Comm'r.*, 308 U. S. 39, at 53) it should *a fortiori* reject a single administrative ruling which conflicts both with an earlier practice and the decisions of this Court.

"Judicial obeisance to administrative action cannot be pressed so far" (*Haggar Co. v. Helvering*, 308 U. S. 389, at 398).

VI.

Since issues of fact are involved, respondent-intervener's application for summary judgment should in any event be denied.

It seems to us that this very important case has been disposed of without a thorough presentation of all the facts. There has been no opportunity to demonstrate the unusual method of arriving at the damages alleged to have

been sustained by the sabotage claimants. The amounts of the awards, on their face, are exceedingly large. As regards the allegation that there has been no proper investigation of the damages suffered, nor anything in the record of the Commission to indicate how the amount of the awards was arrived at, the rules applied thereto, and the investigations that were made (R. 7, 251), the affidavits of the defendant-intervener are absolutely silent (R. 108); and thus the fund, payable to claimants with proper awards, would be payable to the sabotage claimants in a manner entirely *ex parte*.

Furthermore, there are other issues of fact which require judicial investigation, which means the presentation of proofs by the respective parties interested. Heretofore, such opportunity was not afforded to the old awardholders. If the sabotage claimants are entitled to their awards, they should not fear such judicial investigation or trial.

There are at least the following issues of fact raised by the moving and answering affidavits:

First: If the time of the issuance of the certificate is at all relevant, there is an issue of fact as to whether the Certificates of the Secretary of State certifying to the awards were transmitted to the Secretary of the Treasury, with knowledge that this action had been commenced.

It is not disputed that this action was commenced by the filing of the summons and complaint at 9:05 A. M. on October 31, 1939, the day after the rendition of the awards (R. 302); that the Secretary of the Treasury was served at 9:35 A. M. of that day (R. 302); that attempt was made to serve process upon the Secretary of State immediately thereafter (R. 302), and that the Marshal was first in-

formed that he should come the next day (R. 302), and that the Marshal finally succeeded in serving the Legal Adviser, Mr. Hackworth, at about 3:15 of that day, it being claimed that in the meantime the awards had been certified (R. 302).

It appears further that by letters dated June 23, 1939 (R. 307, 309) and October 25, 1939 (R. 305, 306), the Secretary of the Treasury and the Secretary of State were notified that the petitioner protested the awards, and in the two letters dated October 25, 1939 (R. 305, 306), that it would seek an injunction. In the affidavit by Mr. Hackworth it is apparently claimed that acting in behalf of respondent Hull he did not know and that respondent Hull did not know that the action had been commenced or that an injunction against certificates would be sought by petitioner, Z. & F. Assets Realization Corporation.

In other words, on the one hand, it is claimed by the petitioner that the Secretary of State was fully cognizant that a suit for an injunction had already been commenced, and, on the other hand, it is claimed by respondents and respondent-intervener that the Secretary of State was ignorant thereof.

This raises an issue of fact.

Second: Whether the Commission, with Germany's consent, had under consideration the merits of the sabotage claims.

In the moving affidavit of Martin (R. 97), it is asserted that the German Agent consented to a decision on the merits.

In the answering affidavit (R. 231, 235), it is clearly established that Germany never consented to a decision on the merits, even if the motions for reopening were granted. See full discussion of this subject on pages 70 to 72 of this brief.

This at least raises an issue of fact which the lower court had no right to decide adversely to the petitioners.

Third: There is at least an issue of fact whether there was a disagreement between the two national Commissioners authorizing the Umpire to function.

In his letter of March 3, 1939 (R. 290) the German Commissioner states that the Commission was in the midst of its deliberations and no disagreement had been reached.

The respondent-intervener claims the contrary.

This, again, is an issue of fact which should not have been decided adversely to the petitioners.

VII.

The judgment of the Court of Appeals affirming the judgment of dismissal granted by the District Court of the District of Columbia should be reversed, the respondents' motion to dismiss the complaint and the respondent-intervener's motion for summary judgment should be denied.

Respectfully submitted,

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Appendix.

*Constitution of the United States, Article III, Section 2,
Clause 1:*

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Treaty of Berlin, 42 Stat., Part 2, page 1943:

"(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

Treaty of Versailles, Part X, Article 304:

"(a) Within three months from the date of the coming into force of the present Treaty, A Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Germany on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned."

"Annex.

1.

"Should one of the members of the Tribunal either die, retire, or be unable for any reason whatever to discharge his function, the same procedure will be

followed for filling the vacancy as was followed for appointing him."

English text of agreement between the United States and Germany for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded between the two Governments on August 25, 1921, signed August 10, 1922.

AGREEMENT.

The United States of America and Germany being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany, and THE PRESIDENT OF THE GERMAN EMPIRE, Dr. Wirth, Chancellor of the German Empire, who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I:

The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss, or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II.

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III.

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV.

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries

shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V.

Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI.

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII.

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August, 1922.

[SEAL.]

[SEAL.]

ALANSON B. HOUGHTON.

WIRTH.

v

Rule VIII of the Rules of Procedure of the Mixed Claims Commission, United States and Germany (as adopted November 15, 1922, and as amended from time to time, to December 31, 1932) as set forth in the Appendix to Opinions and Decisions, Mixed Claims Commission, United States and Germany from October 1, 1926 to December 31, 1932 (p. XLII):

VIII.

Decisions.

(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.

(b) The Umpire shall at all times have the right to the complete record in any and all cases and to hear oral argument in his discretion.

(c) The Umpire may join with the two National Commissioners in announcing—or in the event of their disagreement certified to him shall announce—principles and rules of decision applicable to a group or groups of cases for the guidance as far as applicable of the American Agent, the German Agent, and their respective counsel, in the preparation and presentation of all claims.

(d) All decisions shall be in writing and signed by:
(1) the Umpire and the two National Commissioners, or (2) by the two National Commissioners where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based.

Settlement of War Claims Act of 1928, 45 Stat. 254, Sec. 2.(a), (b), (c), (d); Sec. 4:

SEC. 2. (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the "Mixed Claims Commission").

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon in accordance with the award, accruing before January 1, 1928.

(c) The Secretary of the Treasury is authorized and directed to pay annually (as nearly as may be) simple interest, at the rate of 5 per centum per annum, upon the amounts payable under subsection (b), and remaining unpaid, beginning January 1, 1928, until paid.

(d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4.

SEC. 4 (a) There is hereby created in the Treasury a German special deposit account, into which shall be deposited all funds hereinafter specified and from which shall be disbursed all payments authorized by section 2 or 3, including the expenses of administration authorized under subsections (c) and (m) of section 3 and subsection (e) of this section.

(b) The Secretary of the Treasury is authorized

and directed to deposit in such special deposit account—

(1) All sums invested or transferred by the Alien Property Custodian, under the provisions of section 25 of the Trading with the Enemy Act, as amended;

(2) The amounts appropriated under the authority of section 3 (relating to claims of German nationals); and

(3) All money (including the proceeds of any property, rights, or benefits which may be sold or otherwise disposed of, upon such terms as he may prescribe) received, whether before or after the enactment of this Act, by the United States in respect of claims of the United States against Germany on account of the awards of the Mixed Claims Commission.

(c) The Secretary of the Treasury is authorized and directed, out of the funds in such special deposit account, subject to the provisions of subsection (d), and in the following order of priority—

(1) To make the payments of expenses of administration authorized by subsection (c) and (m) of section 3 or subsection (e) of this section;

(2) To make so much of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), as is attributable to an award on account of death or personal injury, together with interest thereon as provided in subsection (c) of section 2;

(3) To make each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount thereof is not payable under paragraph (2) of this subsection and does not exceed \$100,000, and to pay interest thereon as provided in subsection (c) of section 2;

(4) To pay the amount of \$100,000 in respect of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of \$100,000 and is not payable in full under paragraph (2) of this subsection. No person shall be paid under this paragraph and paragraph (3) an amount in excess of \$100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid. Pending the completion of the work of the Mixed Claims Commission, the Secretary of the Treasury is authorized to pay such installments of the payments authorized by this paragraph as he determines to be consistent with prompt payment under this paragraph to all persons on behalf of whom claims have been presented to the Commission;

(6) To pay amounts determined by the Secretary of the Treasury to be payable in respect of the tentative awards of the Arbiter, in accordance with the provisions of subsection (s) of section 3 (relating to awards for ships, patents, and radio stations);

(7) To pay to German nationals such amounts as will make the aggregate payments equal to 50 per centum of the amounts awarded under section 3 (on

account of ships, patents, and radio stations). Payments authorized by this paragraph or paragraph (6) may, to the extent of funds available under the provisions of subsection (d) of this section, be made whether or not the payments under paragraph (1) to (5), inclusive, of this subsection have been completed;

(8) To pay accrued interest upon the participating certificates evidencing the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld);

(9) To pay the accrued interest payable under subsection (c) of section 2 (in respect of awards of the Mixed Claims Commission) and subsection (h) of section 3 (in respect of awards to German nationals);

(10) To make such payments as are necessary (A) to repay the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld), (B) to pay amounts equal to the difference between the aggregate payments (in respect of claims of German nationals) authorized by subsections (g) and (h) of section 3 and the amounts previously paid in respect thereof, and (C) to pay amounts equal to the difference between the aggregate payments (in respect of awards of the Mixed Claims Commission) authorized by subsections (b) and (c) of section 2, and the amounts previously paid in respect thereof. If funds available are not sufficient to make the total payments authorized by this paragraph, the amount of payments made from time to time shall be apportioned among the payments authorized under clauses (A),

(B), and (C) according to the aggregate amount remaining unpaid under each clause;

(11) To make such payments as are necessary to repay the amounts invested by the Alien Property Custodian under subsection (b) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of the unallocated interest fund); but the amount payable under this paragraph shall not exceed the aggregate amount allocated to the trusts described in subsection (c) of section 26 of such Act;

(12) To pay into the Treasury as miscellaneous receipts the amount of the awards of the Mixed Claims Commission to the United States on its own behalf on account of claims of the United States against Germany; and

(13) To pay into the Treasury as miscellaneous receipts any funds remaining in the German special deposit account after the payments authorized by paragraphs (1) to (12) have been completed.

(d) 50 per centum of the amounts appropriated under the authority of section 3 (relating to claims of German nationals) shall be available for payments under paragraphs (6) and (7) of subsection (c) of this section (relating to such claims) and shall be available only for such payments until such time as the payments authorized by such paragraphs have been completed.

(e) The Secretary of the Treasury is authorized to pay, from funds in the German special deposit account, such amounts, not in excess of \$25,000 per annum, as may be necessary for the payment of the expenses in carrying out the provisions of this section and section 25 of the Trading with the Enemy Act, as amended (relating to the investment of funds

by the Alien Property Custodian), including personal services at the seat of government.

(f) The Secretary of the Treasury is authorized to invest and reinvest, from time to time, in bonds, notes, or certificates of indebtedness of the United States any of the funds in the German special deposit account, and to deposit to the credit of such account the interest or other earnings thereon.

(g) There shall be deducted from the amounts first payable under this section to any American national in respect of any debt the amount, if any, paid by the Alien Property Custodian in respect of such debt which was not credited by the Mixed Claims Commission in making its award.

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CHARLES ELMORE GROPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.
No. 381.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; **AMERICAN-HAWAIIAN STEAMSHIP COMPANY**, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and **HENRY MORGENTHAU**, Secretary of the Treasury; **LEHIGH VALLEY RAILROAD COMPANY**, Intervener,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF THE PETITIONER, Z. & F. ASSETS REALIZATION CORPORATION, IN REPLY TO BRIEF OF INTERVENER-RESPONDENT, LEHIGH VALLEY RAILROAD COMPANY.

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JOSEPH M. PROSKAUER,
Of Counsel.

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The issues were so fully discussed in our main brief that we limit our reply to a few observations.*

Intervener-respondent assumes that awards were made by a regularly constituted Commission, and that *therefore* any interference with its awards would be a political and *therefore* not a justiciable question. But if we are correct in our contention that a regularly constituted Commission never acted, in other words, that no awards

* We annex hereto, as Appendix A, a chronology of important dates.

were ever made, the conclusion falls with the incorrectness of the premise.

It is contended at length that an international arbitral tribunal has the authority to pass upon its own jurisdiction. We have not argued that it may not do so in the first instance; we have, however, maintained that it cannot by its own fiat endow itself with jurisdiction not bestowed upon it by the charter which has created the Commission. *Hanna v. Stedman*, 230 N. Y. 326, 336.

On page 72, the respondent-intervener has quoted only a part of Judge Moore's statement on the subject of whether the withdrawal of a commissioner is unjustified under international law. The answer of Judge Moore annexed hereto as Appendix B, conclusively proves that the Commission created under the Jay treaty was halted in its work by reason of the withdrawal of the British Commissioners. This is recognized on page 29 of the brief filed by the Government-respondents as follows:

"From the time of the Jay treaty of 1794 to the present date, controversies between the United States and a foreign power as to the jurisdiction of a commission or umpire appointed to arbitrate disputes between the two nations have been settled by negotiations between the diplomatic representatives of the respective governments. The claim of the British commissioners of authority to withdraw from the commission established by the Jay treaty and thus to prevent the commission from functioning was settled in this manner. Moore's Arbitrations, pp. 321-324. Moore's Digest VII, p. 33."

The agreement which created the Mixed Claims Commission provided for the filling of vacancies in any event (R. 17). The motive for retirement is immaterial.

Other fallacies of the intervener-respondent's arguments may be emphasized by brief reference to certain statements in their brief which we believe to be either inaccurate or instinct with erroneous innuendo:

(1) The statement at page 3,* that

"The commission consisted of two national commissioners and an umpire. Unanimity was not required. The concurrence of two was sufficient for a decision."

This statement is inaccurate, in that by the express terms of Article VI of the agreement between the United States and Germany of August 10, 1922, which provided:

"The decisions of the commission and those of the umpire (*in case there may be any*) shall be accepted as final and binding upon the two Governments" (R. 18)

the Commission consisted of two commissioners, one appointed by each Government, who, except where they differed, were competent to transact the entire business of the commission. The function of the umpire was to decide cases or points concerning which the commissioners disagreed. In no sense, could one of the commissioners and the umpire be said to constitute the commission, and to have the power to act ~~as~~ the commission when one of the commissioners was absent, and still less after one of the commissioners had withdrawn.

In elaborating the contention above stated, the brief further says that the question arises whether the "attempt of Germany to frustrate the arbitration was effective to prevent the umpire and American commissioner from proceeding to dispose finally of the cases", that

* Page references are to respondent-intervener's brief unless otherwise noted.

"Germany argued that it was effective", and that "the two remaining members of the commission considered this question and held they had the power, and exercised it". Here again we have in precise terms the theory and the claim that the "attempt" of one party to "frustrate the arbitration" clothed the commissioner of the other party and the umpire with all the powers of the commission. Probably such a contention never was made before. If it was, we may assume that the precedent would have been cited.

(2) The brief of intervener-respondents contains at page 3, the following statement:

"The commission (with its membership then full) held in 1933 that it had power to re-open the cases. In 1939, after continuous litigation since 1933 and the production by both Governments of masses of further evidence, the Commission set aside the 1930 decision, held Germany responsible for the Black Tom and Kingsland destructions, and entered awards on the sabotage claims."

The fact is that the Umpire (not the Commission) held in 1933 that the Commission had the power to reopen if the former decision had been induced by fraud, in spite of the statement of the German Government that "The German Government regards the Commission as being without authority to pass upon a difference of opinion which may exist between the two Governments in this connection" (R. 90, 229, see pp. 67 to 70 of our main brief).

In saying that "the Commission * * * held Germany responsible for the Black Tom and Kingsland destructions, and entered awards," not only does the brief lack the precision essential to an understanding of the case, but it wholly evades the very question at issue, namely, whether

the so-called awards were made by the Mixed Commission for which the agreement between the two Governments provided.

By the express terms of the agreement, the essential constituents of the commission were the two commissioners, one appointed by each Government. This is precisely what was meant by calling it a "Mixed Commission," and if anything beyond common usage and understanding were needed to demonstrate the fact, it would be found in Article VI of the agreement quoted above. Had the two commissioners always agreed, there need not have been an umpire. The umpire was not a commissioner, nor could he in any event take the place of a commissioner or act as a commissioner. In no case and in no sense could he be considered as the United States or as the German commissioner. Nevertheless, the brief for Intervener-Respondent now in effect takes the ground, which, in order to sustain its thesis, it is obliged to assume, that the umpire could at one and the same time play the part both of umpire and German commissioner, and thus, after the German commissioner's withdrawal, make awards in cases that were previously pending (See pp. 67-70 of our main brief).

(3) The brief for intervener-respondent raises the question (p. 6) whether it is "open to any private citizen to question an award which is acceptable to the United States", as well as the question whether either Government has contemplated or consented that the decisions of the Commission are subject to review in the domestic courts of either country." In answer to this inquiry, it may suffice to say that those who are seeking relief in the present judicial proceeding are not asking for a judicial review of the decisions of an international commission but are appealing to the courts for

the protection of their interest in a fund which is in the possession of the United States and which has been held in such possession for the satisfaction of the claims of persons who owe permanent allegiance to the United States and who have suffered through the acts of the Imperial German Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property. These are the precise terms of the Knox-Porter Resolution which was incorporated in the treaty between the United States and Germany concluded at Berlin on August 25, 1921. It was for the purpose of carrying out this Resolution that the agreement of August 10, 1922, for the creation of a Mixed Commission was concluded between the United States and Germany. By the Settlement of War Claims Act of 1928 it was made the duty of the Secretary of State to certify to the Secretary of the Treasury, from time to time, the awards of the commission and the Secretary of the Treasury was authorized and directed to pay such awards. The Act was passed for the purpose of keeping the matter within the domain of law, to the end that the claimants, who were citizens of the United States, might assert and protect their pecuniary rights by legal action, whether administrative or judicial.

The Secretary of State, in his reply of October 18, 1939 (R. 217), to the protest of the German Embassy against the assumption of the American Commissioner and the umpire to discharge the functions of the commission, said that he must content himself with stating that, as the Department had no jurisdiction over the commission, it would be highly inappropriate for him to intervene in any way in the matter, but added that he had "entire confidence in the ability and integrity" of the umpire and the American Commissioner and that the "remarkable action" of the German commissioner in with-

drawing "was apparently designed to frustrate or postpone indefinitely the work of the Commission." In saying this, the Secretary of State clearly refrained from expressing any opinion of his own as to the legality or the propriety of what the American commissioner and the umpire were doing. Should such an expression as this be regarded as precluding citizens of the United States from appealing to the courts for the protection of their legal rights, this would in effect mean that the action of the American commissioner and the umpire was to be treated by all the authorities of the United States as conclusively establishing its own legality. Such could not have been the intent, because, if the purpose of Congress was to make the certificate of the Secretary of State conclusive, it would have used the same language as in Section 8 of the Settlement of War Claims Act which specifically declares "that decisions by the Secretary of the Treasury in respect of payments from the funds are final and conclusive and * * * not * * * subject to review by any other officer of the United States * * *" (see p. 43 of Government-Respondents' brief).

The fact that the Secretary of State referred the subject matter of the aforesaid protest to the so-called Commission, is a clear indication that the Secretary of State did not consider himself authorized at any time to function judicially and, therefore, the certificate must be regarded as a purely ministerial act.

(4) It is contended by the respondent-intervener (at pp. 35 *et seq.*) that the controversy herein is entirely an inter-governmental affair, and as basis for such contention it is argued that the ownership of these claims is in the United States. It is a misuse of the word "ownership" to attribute the same to the Government. The Government concedes that the private claimants are the real parties in interest. Judge Parker in his Opinions and

Decisions (pp. 186; 192) has emphasized this fact. The courts, therefore, ought not to be misled by the formal approval of the United States to conclude that this is exclusively an inter-governmental matter. This would be to allow form to conceal or repudiate the substance. The substance is that these are private claims against the German Government. It was for these private claimants that the Knox-Porter Resolution was passed. It was for the private claimants that the Government entered into an agreement with Germany to execute the terms of the Knox-Porter Resolution. To now project the United States Government as the exclusive party in interest and then to claim that the challenge of the award is to defeat and impair the interest of the United States, is a distortion. ~~It is not as to amount to a misrepresentation.~~ The United States is nothing but a protector, an agent, to present the claim of a private claimant. Before an arbitration it is actually, as Judge Parker said, "a private claim" in which the United States is merely the formal American citizen. It is inconceivable that the United States would retain for itself an award made on behalf of a citizen. That it could technically do so, because it can only be sued as Congress permits, is beside the point. But the fact is that the United States would never think of pocketing the award, and the Act of 1896 considers the United States in collecting the award as a trustee.

It is for these reasons that the argument, so patriotically presented, to the effect that this is a claim of the United States with which no court may interfere and that only the Executive can determine whether the other American claimants have been wronged is a misrepresentation and thoroughly misleading. No tribunal should be deceived by this argument.

The petitioners derive their interests "from an Act of Congress", as the intervener-respondents admit (p. 36).

The agreement itself is the execution of an Act of Congress. The petitioners would be deprived of their rights under the Act of Congress if an illegal award is handed down on behalf of said claimants.

On the finality of the award the respondents explain that finality means to foreclose a review by any other tribunal but not by the arbitral tribunal that rendered the award. This is an error. The finality of the award was designed to prevent the United States or the claimant on behalf of whom they speak, from ever opening the argument. It was also designed to foreclose the defendant government from questioning the award. Not in any respect did it look to the invocation of private rights before a domestic tribunal. That is an independent matter with which the agreement had nothing to do. The sabotage claimants concede that the new award is final, but not the Hamburg award.

This, therefore, is not a political question between the two governments. This is a contest between private claimants, both citizens of the United States. It is only in that formal sense that the American Agent entered the picture. The Department of State itself took no interest in these claims and repeatedly refused to heed complaints made with respect to the functioning of the American Agent. To now assert that the foreign policy of the United States would be upset and impaired by an examination of the formal validity of such unilateral awards as were handed down by the two Americans on the Commission is to misrepresent the facts and the law.

(5) The statement at page 15, that

"The two governments acted upon that decision [of 1933]"

omits the qualifying statement that the further proceedings were taken under the unanimous decision of

both commissioners and umpire, stating, *in haec verba* and to meet Germany's claim of usurped power, that the proceedings were limited solely to the question of a rehearing of the motion to set aside the old awards and not to a hearing on the merits (p. 70 of Our Main Brief). In connection with this 1933 decision and subsequent proceedings, it should be noted that the umpire in acting had before him a letter of the then acting German agent, quoted in the following excerpt from the minutes of the meeting of October 30, 1933 (R. 229):

"It is understood that it is the position of the German agent that he is not authorized to take any part in this proceeding, and the umpire further stated that the umpire will be entirely willing to receive any observations or representations the German agent may wish to make in the pending matter, and he is willing to receive such as in the nature of a special appearance and is not conceding anything and without prejudice to the position of the German Agent's Government before the commission."

(6) The statement on page 15 that the German Agent was given opportunity by a special order of the Commission of December 1, 1937 to file any evidence he desired, and that he exercised this privilege, may be misleading if divorced from the fact that the Umpire himself recognized the then existing reservation that evidence as to the merits was to be considered only as bearing on the motion for a rehearing and not as to the propriety of any new award. Evidence was presented only after a recognition by the entire Commission that such presentation would be without prejudice, as appears from the excerpt from the Minutes of the meeting of October 30, 1933 just quoted (R. 229). In view of this reservation, said evidence must be regarded as presented without prejudice in accordance with the practice recognized in

Harkness v. Hyde, 98 U. S. 476, and *Blaudin v. Ostrander*, 239 Fed. 700.

(7) If the statement on page 23 attributed to Mr. Garnett, to the effect that at the conferences prior to the retirement of the German Commissioner, the German Commissioner had invited a decision on the merits of the sabotage claims, is intended to convey anything more than Mr. Garnett's own conclusion, it is erroneous. We are certain, however, that Mr. Garnett's statement was not intended by him to be a statement of evidentiary fact, and was no more than his own personal conclusion drawn from record facts, about which there is and can be no dispute. If it be claimed that Mr. Garnett's statement is entitled to any greater weight, the motion for summary judgment was improperly granted, since we would be entitled to cross examine Mr. Garnett upon the statement attributed to him, and we are certain that upon any such cross examination Mr. Garnett would be the first to agree with our construction of said statement. Mr. Garnett's statement is presumably based upon the request made by the German Commissioner to the effect that in order to ascertain whether the application for rehearing should be granted, the Commission should first ascertain whether the sabotage claimants had themselves presented such fraudulent evidence as to dis-entitle them to a rehearing. In other words, what the German Commissioner suggested was that, if the sabotage claimants had come before the Commission with evidence based on fraud and perjury such as had been found to be the case in the decisions of October 1930 and December 1932, then the sabotage claimants had not made a *prima facie* case and would not be entitled to a reopening. Many times on an application for a new trial the question arises whether a different result would be obtained

if a new hearing were granted, and if the testimony already presented by the moving party is permeated with fraud and perjury; the granting of a new trial would be wholly unwarranted. This does not imply that if a rehearing is granted, the party opposing the trial may not present such additional evidence upon such new trial as to defeat the party moving for such rehearing.

(8) The statement at the top of page 26 of the Lehigh Valley brief that "The motions [to which the Umpire referred on June 15, 1939] were motions to reopen" is a concession that the Umpire did not accept the request of the American Agent to decide the merits, and is further proof that the merits were not before the Commission at the time of the retirement of the German Commissioner.

(9) The mere fact that in May, 1934, by exchange of notes (referred to on p. 62 of Respondent-Intervener's Brief), it was mentioned that the sabotage claims were still pending, does not signify any assent on the part of the German Government that the Commission had jurisdiction to rehear the claims.

The fact is that Dr. Kiesselbach, the German Commissioner, had expressly stated that, as the decision of 1930 was final and binding, the Mixed Claims Commission had no jurisdiction to reopen and jurisdiction could not be conferred to do so, except by a new agreement between the two governments (Report of American Commissioner, Dec. 30, 1933, p. 53).

Furthermore, the following rule of the Commission was violated (R. 209):

"If any member of the Commission considers a point not orally argued one which should be taken into account in the Commission's decision, counsel's

attention will be called thereto during the progress of the argument or subsequent thereto, and counsel for both parties will be given an opportunity to discuss same on the oral argument or to file written or printed briefs within a time to be fixed by the Commission covering such particular point or points."

If the Umpire and the American Commissioner concluded on June 15, 1939 that the motion of the American Agent for awards should be granted, then under the terms of the last quoted rule, the German Agent's attention should have been called thereto by the Commission. It appears that the German Agent, in the light of the agreement made with the American Agent in the years 1927 and 1928, never submitted any counter-proof on the question of damages; and the amount of damages, therefore, was arrived at entirely *ex parte* and solely on the basis of what the lawyers for the American and Canadian parties had submitted (R. 212).

(10) The statement in the footnote on page 26, that

"The claimed distinction between the issues of German fraud and German liability had become unreal,"

fails to point out that the German commissioner had insisted at every step of the proceeding that there was a real distinction between these issues and the proceedings necessary for their determination, and that the umpire himself had acquiesced in that position. See page 70 of our main brief, where we quote the umpire's statement that

"If the parties were in agreement that this course should be followed, the commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. *I am of opinion this is her right.*" (Italics ours.)

(11) The statement on page 16 that the rule of the Commission requiring a certificate of disagreement signed by both commissioners had been "held in the decision of the commission of December 15, 1933 to have been adopted merely for the convenience of the Commission and not to be essential if there was in fact a disagreement", fails to point out that this decision was not by the Commission at all but merely by the umpire who was making that decision, purportedly on behalf of the Commission over the protest of the German commissioner (see p. 11 of our main brief).

(12) On page 82 it is stated that years ago the Commission held that the rule providing for a written certificate of disagreement was contrary to the agreement of August 10, 1922. The agreement of August 10, 1922 is silent as to how the disagreement should be evidenced. The mere fact that the agreement was silent does not preclude the Commission from making rules which have, as far as the Commission is concerned and the parties before it, the force of law. In view of the facts that the agreement is silent and that the rules so established are not inconsistent with the provisions of the agreement, the rules are binding and the statement contained in the Umpire's decision that these rules need not be observed is unjustified in law.

(13) It is further contended on page 63 that the Commission was a continuing body and that, therefore, the previous decisions remain subject to modification by later rulings of such Commission. An examination of the copies of the awards in the Decisions and Opinions indicates that each award is a decision in a separate claim. As previously stated, some of the awards were the result of rulings of the two National Commissioners, and it cannot be the case that these previous awards were subject

to reopening by two other Commissioners functioning years afterwards.

(14) On page 30 issue is taken with our statement that the amount of the damages was fixed *ex parte*. We have never claimed that evidence had not been submitted which might have been relevant on the amount of the damage, if that issue had been properly before the Commission. All we have claimed, and this much cannot be disputed, is that such evidence was adduced at a time when all the parties had agreed that the only issue before the Commission was the propriety of granting the motion to reopen the prior dismissals. The issue as to the merits or as to the amount of the alleged damage was not before the Commission. This was recognized by all the parties, and no evidence on the issue of damage was ever presented to the Commission by the German Agent. Under the circumstances, we feel that our statement that the fixing of the amount of the damages was *ex parte* is justified (see p. 6 of our main brief).

(15) The statement on page 32 that "The evidence on damages was carefully sifted and the awards were some \$2,000,000 less than the claims presented by the United States (R. 82, 63-73)," infers that the evidence as to damage had been carefully sifted as a litigated issue. As a matter of fact, however, the contrary was true. The motion of the American Agent asking for the issuance of awards having been made on June 15, 1939, and granted on that day, could not have been litigated or discussed by both Commissioners at any stage (R. 214), nor could it have been the subject of any exchange of opinion between the two National Commissioners.

(16) The statement on page 8, purporting to set forth the origin of the funds of the German Special Deposit

Account, omits the Congressional appropriation of more than \$86,000,000, as stated in our main brief, page 30.

(17) The statement on page 9 that "Germany agreed to replenish the Special Deposit Account" is inaccurate, in that Germany merely agreed to make certain payments to our Government and that said payments were, by Act of Congress, turned over to the Special Deposit Account.

(18) The statement on page 12 that the Commission in its decision of October 16, 1930 found "that Germany had authorized sabotage in the United States, but that the United States had failed to prove that Germany had caused the destruction at Black Tom and at Kingsland", fails to mention the Commission's findings that the evidence presented by the sabotage claimants was permeated with perjury and fraud and bribery of witnesses. For example:

"Hilken and Herrmann are both liars, not presumptive but proven. No one could in the light of all their evidence believe anything either says unless something other than his own assertion confirmed his statements. Hilken's first long and detailed statement in these cases contained nothing of what he now says in respect to Kingsland. He had previously testified before the Alien Property Custodian and had lied continuously. In his first statement for the Commission he professes his willingness to tell the entire truth. If he did, there can be no truth either in his or Herrmann's present story" (R. 265).

"We do not imply or think that anything improper was done to induce him to testify, merely that it is sufficiently obvious that Herrmann would not have turned his coat if the German Government or the German Legation in Chile had offered him appro-

appropriate inducements, and that having turned his coat because of advantage to himself he is pretty sure to be in a mental attitude in which hostility to Germany and desire to make good with the claimants play a substantial part. And there is nothing about Herrmann of which we feel so sure as that he will lie if he thinks lying worth while from his own point of view" (R. 266).

(19) The intervener-respondent claims at pages 75-77 of its brief, that the statement of Judge Parker, the Umpire, to the effect that he would insist upon a decision of the sabotage claims, no matter what Germany might do, showed an intent of the Congress that a subsequent umpire years later might compel the German Government to abide by the re-opening of the claims and the making of new awards, is hardly justified.

Assuming *arguendo* that the proceedings before the Congressional Committee were sufficient to show a Congressional intent that an award should be made in the first instance, they hardly warrant the assumption that after such an award had been made, it might be set aside and new awards substituted in their place.

What Mr. Boles, on behalf of the sabotage claimants, besought the committee to effectuate was to prevent the return of any German property until after the disposition of the sabotage claims. Judge Parker's answer (at p. 202) was that he thought the Boles amendment unnecessary; and the facts justified his belief, since the Commission did dispose of the sabotage claims in 1930. The colloquy before the committee, directed toward the desirability of the Boles amendment, can hardly be tortured into support for the claim that the Congress intended the Commission to function indefinitely after the disposition of these claims.

(20) In connection with the claim on page 74, that the Settlement of War Claims Act was enacted in reliance "on assurances from Germany that she would not impede or obstruct the Commission in the disposal of these very sabotage cases", it is relevant to point out that Germany submitted these sabotage cases to the Commission who, in dismissing the claims, pointed out that fraud and perjury had permeated the evidence submitted by the sabotage claimants (R: 265).

(21) At pages 73-74 it is urged that Germany should not be permitted to frustrate the arbitration by withdrawing her commissioner, because "The Settlement of War Claims Act" of 1928 (45 Stat. 254) was enacted in reliance upon the fact that the Commission had been established. The history of its enactment, however, does not support the claim of estoppel or reliance. The Act provided for the return of seized property to its former German owners, and not to Germany; and there was in fact no such reliance as claimed.

The enactment of the Act was based upon the policy of the United States, from the time of its existence, that there should be no permanent confiscation of enemy property (Senate Report No. 273, 70th Cong., 1st Session, p. 12) together with the desire to satisfy legitimate claims of citizens of the United States against Germany (*Deutsche Bank v. Cummings*, 83 Fed. (2) 554, 560, reversed on other grounds 300 U. S. 115).

The Settlement of War Claims Act was, in fact, based upon an agreement made between former German owners of property and a committee of American nationals having claims against Germany (Hearings, Committee on Finance, Jan. 8, 1927, 69th Cong., 2d Session, p. 129).

Since 1925, the Treasury Department had insisted that the institution of private property and the protection of

American private property abroad, made it essential that the sequestered private property be returned in full to its owners (see Document No. 191, 69th Cong., 2d Session).

An Administration bill to this effect was introduced in 1926. The American claimants against Germany, however, felt that if the property were returned in full there would be insufficient funds with which to pay any considerable percentage of their claims. They therefore proposed immediate return in full, and advocated a compromise. The American claimants agreed that the owners of claims under \$100,000 should be paid in full, whereas the balance of the large claimants would accept \$100,000 plus a sum sufficient to make up 80% of the total awards. For the balance, drawing interest at 5%, the American claimants were willing to wait.

In the Report from the Senate Committee on Finance which accompanied the Settlement of War Claims Bill of 1928 (Report #273), the following is stated (p. 4):

"Under the terms of the bill an amount equal to 80 per cent of the aggregate of the awards entered by the Mixed Claims Commission, entered on account of claims of nationals of the United States, is to be used immediately for the payment of all death and personal injury claims awards and all awards of \$100,000 or less. The balance is to be prorated among the larger awards. The above percentage was reached by an agreement between the representatives of the American claimants affected and of the German alien property owners. The representatives of the American claimants appeared before your committee and testified that the percentage was very satisfactory and that they preferred that the provisions of the bill be in accordance with the agreement. Consequently, your committee is recommending no change."

In the same Report, at page 13, there is a reference to the "suitable provision" clause in the preamble to the Treaty of Berlin, which indicates that Congress at the time of the passing of the Settlement of War Claims Act considered that "suitable provision" was thereby being made for the payment of American claims.

Consequently, there is no basis for the contention that the Settlement of War Claims Act was enacted in reliance upon the fact that the Commission had been established.

(22) In regard to the quotation from the opinion of Mr. Nielsen on page 60, the following may be stated: The quotation is from the dissenting opinion in a case before the General Claims Commission, United States and Mexico. No motion for rehearing was pending before that tribunal in that case. The Commissioner distinguished between a protest made by a Government attacking the validity of an award and a motion for rehearing made by counsel before a Commission. A ruling adopted by the Commission in 1926 reads as follows:

"Upon the application of either Agent made within sixty (60) days after the Joint Secretaries have furnished the Agents copies of the awards or other decisions, and after giving the other Agent an opportunity to be heard, the Commission may interpret or rectify a decision which is obscure or incomplete or contradictory or which contains any error in expression or calculation or in which the two texts do not correspond." (Rules of the General Claims Commissions United States and Mexico as amended to October 25, 1926, Rule XI, par. 6.)

Pursuant to that rule, the Agents of the two Governments made some motions, conformably to which English and Spanish text were harmonized by trivial verbal changes. *Opinions of Commissioners*, 1927, pages 193-197.

In Mr. Nielsen's work, "International Law Applied to Reclamations", page 74 published in 1933, his views regarding the finality of the awards is shown by the following passage:

"Motions for Rehearing.—Arbitral agreements generally stipulate the finality of awards. Disagreeable questions such as have arisen with respect to motions for rehearings of cases could be avoided by a rule of procedure providing for a period for the presentation of such motions and *expressly* withholding finality from decisions until after the lapse of the specified period."

(23) In the footnote on page 81 it is claimed that the counsel for the petitioner in No. 382, in an opinion rendered by him as Commissioner in the settlement of the American-Turkish claims, stated that the nationality of a corporation is that of the State under whose law the corporation is organized. Nothing is quoted in the brief from what precedes or from what follows that sentence. The opinion shows that the Commissioner was dealing with a claim which, it appeared, had been presented by a British company to the British Government, which disallowed it, because the British company was a wholly-owned subsidiary of an American corporation, and that the Commissioner in turn disallowed the claim because of lack of proof of American interest.

(24) On page 85 of the intervener-respondent's brief it is stated that petitioners present no affidavit from anyone assuming to have personal knowledge. In the first place, the affiant Rogers in his affidavit has stated merely record facts, except on the subject of the method of ascertaining the amount of damages and the conference in connection with the ascertainment of such damages.

On these subjects he demanded in his affidavit the examination of Mr. Martin, and that opportunity was refused him by the District Court (R. 252).

Conclusion.

In conclusion, petitioner asks for its day in court. It has never had such day in court. Its complaint has been dismissed for lack of jurisdiction. In contrast, the claims of the Lehigh Valley Railroad Company, Bethlehem Steel Corporation and Agency of Canadian Car & Foundry Company, Ltd., etc., were represented on the vital questions of whether a rehearing should be granted, the granting of awards and the quantum of damages, by their own counsel who appeared for the Government (see, also, petition for rehearing, signed by the various attorneys for the sabotage claimants, R. 121).

Respectfully submitted,

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Appendix A.

CHRONOLOGY OF IMPORTANT DATES.

Oct. 16, 1930

Sabotage claims dismissed by Commission. (Roland W. Boyden, Umpire, Chandler P. Anderson, American Commissioner, W. Kiesselbach, German Commissioner) (R. 260).

Mar. 30, 1931

First petition to reopen dismissed by Commission (Same Members as October 1930). The decision reads, in part, as follows (Dec. & Op., p. 995):

"Although the rules of this Commission, conforming to the practice of international commissions, make no provision for a rehearing in any case in which a final decree has been entered, these petitions have been carefully considered by the Commission." (Italics ours.)

Dec. 3, 1932

Second petition to reopen dismissed by Umpire Roberts, after receiving a Certificate of Disagreement signed by the two National Commissioners. This Certificate, dated November 28, 1932, reads, in part, as follows (Dec. & Op., p. 1004):

"The American Commissioner and the German Commissioner have been unable to agree upon the decision of the questions presented in these cases as aforesaid, and their respective opinions having been stated to the Umpire they accordingly certify the above mentioned cases and all the questions arising under the supplemental

petition therein to the Umpire of the Commission for decision, *except that the German Commissioner takes the position that the question of the jurisdiction of the Commission to re-examine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate.*" (Italics ours.)

May 4, 1933

Third petition for rehearing filed (R. 115).

Oct. 11, 1933

Letter of protest by the German Ambassador to the Secretary of State, reading in part as follows. (R. 90):

"The German Government (as stated in the Embassy's note of July 6, 1933, and in my conversation on August 24, 1933, with the Acting Secretary of State, Mr. Wilbur J. Carr) considers petitions for rehearing in conflict with existing treaty provisions, contained in paragraph 3, Art. VI of the agreement of August 10, 1922, between the United States and Germany. The German Government regards the commission as being without authority to pass upon a difference of opinion which may exist between the two governments in this connection."

Dec. 15, 1933

Decision of Umpire Roberts after receiving a certificate of disagreement prepared by the American Commissioner at the suggestion of the German Commissioner and submitted with two opinions of the American Commissioner and two opinions of the German Commissioner which were transmitted with

a letter, which letter was quoted in the following excerpt from the minutes of October 30, 1933 (R. 229):

"it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Umpire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government, before the Commission."

Nov. 9, 1934

Decision of Umpire Roberts upon Certificate of Disagreement by National Commissioners (Anderson, American, and Huecking, German) denying motion for bill of particulars (R. 230).

July 29, 1935

Decision of Umpire Roberts (after receiving certificate of disagreement of American Commissioner Anderson and German Commissioner Huecking), limiting question before the Commission to reopening and stating (R. 144, 231):

"The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing."

June 3, 1936

Decision of Commission (Umpire Roberts, American Commissioner Anderson and German Commissioner

Huecking) setting aside the dismissal of December 3, 1932, which dismissed, for the second time the sabotage claims and stating that this decision had "no bearing on the decision rendered at the Hague and does not reopen the cases as far as that decision is concerned" (R. 140), with the limitation that under the Commission's decision of July 29, 1935, the subject of a rehearing must "be determined by a hearing separate from and distinct from any argument on the merits".

Sept. 12, 1936.

Christopher B. Garnett appointed American Commissioner in place of Anderson, deceased (R. 223).

Jan. 16, 1939

to

Jan. 27, 1939

Oral argument before Commission (Umpire Roberts, Garnett, American Commissioner, and Huecking, German Commissioner) on question whether application for rehearing, dated May 4, 1933, should be granted (R. 96, 235).

Mar. 1, 1939.

German Commissioner retired (R. 104, 236).

June 15, 1939

Upon Certificate of Disagreement signed by American Commissioner only, Umpire Roberts rendered decision granting pending motion for rehearing (R. 59).

June 15, 1939

American Agent made a motion that awards be granted in favor of the United States on behalf of the sabotage claimants, which motion was granted by the Umpire on that same day (R. 105).

June 23, 1939

Letters of protest sent by petitioner to Secretary of State and Secretary of Treasury (R. 307, 309).

Oct. 25, 1939

Letters to Secretary of State and Secretary of Treasury advising that action would be commenced as soon as awards made to sabotage claimants (R. 305, 306).

Oct. 30, 1939

153 awards submitted to Umpire Roberts and American Commissioner Garnett for signature (R. 107).

Oct. 30, 1939

153 awards certified by the American Joint Secretary of the Commission to the State Department (R. 110).

Oct. 31, 1939

9:15 A. M.: Complaint in this action filed (R. 302).

Oct. 31, 1939

Complaint served upon defendants (R. 311, 332).

Oct. 31, 1939

153 awards certified by Secretary of State to Secretary of Treasury (R. 110, 312).

Appendix B.

ANSWER OF JOHN BASSETT MOORE TO STATEMENT ON PAGE 72 OF BRIEF FOR INTERVENER RESPONDENT, LEHIGH VALLEY RAILROAD COMPANY, WITH REFERENCE TO WITHDRAWAL OF COMMISSIONER IN CONNECTION WITH THE ARBITRATION WHICH TOOK PLACE UNDER THE JAY TREATY OF 1794.

By Article VI of the treaty between Great Britain and the United States of November 19, 1794, commonly called the Jay treaty, provision was made for the arbitration of claims against the United States for the confiscation of pre-war debts. For the purposes of the arbitration provision was made for the appointment of a mixed commission, to consist of five commissioners, two of whom should be appointed by Great Britain and two by the United States. The choice of a fifth commissioner was left to the four thus appointed and, if they could not agree on a choice, the fifth commissioner was to be chosen by lot.

It was further stipulated that three of the commissioners should "constitute a board," and should "have power to do any act pertaining to the said commission, provided that one of the commissioners named on each side, and the fifth commissioner shall be present, and all decisions shall be made by the majority of the voices of the commissioners then present".

The commission was duly constituted, and eventually, in the course of its proceedings, the two United States commissioners sought to prevent the entry of judgments by what were called "acts of secession," or, in other words, absenting themselves from time to time with a view to prevent the entry of awards.

A right of secession, such as that just described, had previously been claimed by the British members of a mixed commission at London, which was similarly constituted under another article of the same treaty. The

first withdrawal of the British commissioners in London was prompted by the maintenance by a majority of the five commissioners of a right to make awards on certain claims which the other two commissioners contended were not within the commission's jurisdiction.

In discussing this subject in my *International Adjudications, Modern Series*, Volume III, page 169, I stated that "the claim of a right to withdraw, as first asserted at London and afterwards at Philadelphia, for the purpose of preventing a majority of the board from acting," could, as a question of law, hardly be maintained upon the terms of the treaty, which, while stipulating that three of the commissioners should "constitute a board" and should "have power to do any act appertaining to the said commission," added the proviso that "one of the commissioners named on each side and the fifth commissioner shall be present," and that all decisions should be made "by the majority of the voices of the commissioners then present". The object of this proviso was, as I pointed out, "to prevent the commission from proceeding when either government was wholly unrepresented in the board". Commenting on this subject I said, in the volume above cited, at page 170:

"The reasonableness of the proviso proved, as things turned out, to be specially manifest both at London and at Philadelphia. At London the fifth commissioner happened to be a citizen of the United States, at Philadelphia he happened to be a British subject; so that without the proviso, the spectacle might have been witnessed of an international board, consisting wholly of citizens or subjects of one of the contracting parties, deciding the claims made by their own compatriots against the other government. Governments are not accustomed to agree to the constitution of arbitral boards of that kind. On the other hand, it can hardly be supposed that the gov-

ernments, in agreeing to Articles VI and VII, had it in mind to create a device by which either of them, or the commissioners named by either of them, might, by withdrawing, readily prevent the majority of a duly constituted board from exercising its constitutional powers. The fact that the actual secession of the commissioners on either side, or of the fifth commissioner, would prevent the board from acting, by no means implies that it was intended to create a right of secession for the purpose of subjecting the board to the control of either government, or conceivably, to the control of the fifth commissioner against the will of both governments.

"As the claim of a right to withdraw cannot reasonably be deduced from the terms of the treaty, so likewise is it unjustified under international law. Its justification in the present instances, whether at London or at Philadelphia, must, therefore, be sought in moral rather than in legal considerations."

It will be observed that in commenting on the proviso I commended its reasonableness and propriety on the express ground that, without it, "the spectacle might have been witnessed of an international board, consisting wholly of citizens or subjects of one of the contracting parties, deciding the claims made by their own compatriots against the other 'government,' and I added: "Governments are not accustomed to agree to the constitution of arbitral boards of that kind."

On the other hand, I said that it could "hardly be supposed that the governments . . . had it in mind to create a device by which either of them, or the commissioners named by either of them, might, by withdrawing, readily prevent the majority of a duly constituted board from exercising its constitutional powers". It is further to be observed that in the instances above discussed the commissioners did not resign. Had they resigned their office, probably nobody would have contested their right to do so,

or would have claimed that the commission still existed in spite of their resignation. The right of withdrawal, claimed first in London and then in Philadelphia, was purely and simply a claim to prevent the majority of the commission from discharging its functions while still retaining its full membership. Such a claim certainly is not justified on any principle of law, international or otherwise.

Nevertheless, it will be observed that the commission at Philadelphia did not go on with its business and make awards. The work was brought to a standstill. Lord Grenville, the British Secretary for Foreign Affairs, while remonstrating against the course of the United States commissioners in Philadelphia, retaliated by directing the British commissioners in the mixed commission in London to suspend proceedings until the difficulty should be settled.

The quarrel in the commission at Philadelphia went on until July 19, 1799, when the two United States commissioners addressed to the other three commissioners a letter, in which they declared that, on review of what had occurred at the meetings and in the proceedings of the board, they deemed it to be improper for them to give their "further attendance".

Between July 23 and September 4, 1799, there were twelve entries in the Minutes of the Board, each of which set forth that three commissioners "attended as usual for the purpose of forming a board," but that, the two United States Commissioners being absent, "no board could be formed".

When this entry was officially communicated to the two seceding members, they replied that they did not recollect that they had ever said on any occasion "that the board has ceased to exist," and that "they had never held such an opinion." (See my *International Adjudications*, Modern Series, Volume III, pp. 275-277.)

The breach was not healed and the commission came to an end. Its end is recorded in a letter addressed by the majority, on September 30, 1799, to the seceding minority, in which the majority said that their imaginations could not suggest "on what ground of consistency" the minority would ever find itself "at liberty to suffer the majority of the board to decide".

Thus endeth the reading of the story of the commission; and the claims were finally disposed of, not by the majority undertaking to perform the functions of the commission, but by the conclusion between Great Britain and the United States on January 8, 1802, of a treaty or convention under which the British government accepted in full settlement of all the claims the sum of Six Hundred Thousand Pounds (£600,000). The distribution among the British claimants of the money thus paid was made by a British commission, in London.

On the other hand, the convention of January 8, 1802, provided that, upon its signature, the commissioners at London under Article VII of the Jay Treaty, whose proceedings had been suspended as an act of retaliation, should reassemble and proceed with their work under that Article, and this was done.

It is evident that the precedent which Intervener-Respondent has so incompletely cited,—a precedent representing the concurrent opinion and action of both the United States and Great Britain—, is fatal to the contention in support of which it has been invoked. Both the United States and Great Britain concurred in the view that, although the absence of the commissioners, first on one side and then on the other, was deliberate, and was designed to prevent the making of awards, yet it did preclude the making of them, in spite of the fact that the commissioners had not resigned and were still in office.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 382

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA.**

**BRIEF FOR PETITIONER AMERICAN-HAWAIIAN
STEAMSHIP COMPANY.**

FRED K. NIELSEN,
Attorney for Petitioner,
American-Hawaiian Steamship Company.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 382

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER AMERICAN-HAWAIIAN STEAMSHIP COMPANY.

Opinions of the Courts Below.

The opinion of the District Court of the United States for the District of Columbia (R. 295) is reported in 31 F. Supp. 371. The opinion of the United States Court of Appeals for the District of Columbia (R. 335) is reported in 114 F. (2d) 464.

Jurisdiction.

The judgment of the Court of Appeals for the District of Columbia was entered on June 3, 1940 (R. 354). The peti-

tion for writs of certiorari was filed on August 29, 1940, and was granted on October 14, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Section 347(a), Title 28, U. S. C.

Statement of the Case.

The present case involves a conflict of rights asserted by American claimants with reference to a fund on deposit in the Treasury Department. The judicial determination of those rights requires, in the first place, an interpretation of an important Federal statute and, in the second place, an interpretation of important international covenants, which were effectuated by the statutory provisions. The fundamental question raised by the decision of the Court of Appeals is whether judicial action with respect to these questions is precluded by a proper application of principles of constitutional law pertaining to "political" questions.

The petitioner and the intervener-petitioner asked the District Court for an injunction to restrain the Secretary of State from certifying and to restrain the Secretary of the Treasury from paying some awards said to have been rendered on October 30, 1939 (R. 181), by the so-called Mixed Claims Commission, established under an agreement concluded by the United States and Germany on August 10, 1922 (R. 12; 31). Such payments would exhaust the funds in the Treasury available for the payment of awards in accordance with the Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, and leave unpaid awards made many years ago in favor of the petitioner and in favor of the intervener-petitioner.

It is shown in the petitioner's complaint that it is the holder of awards rendered some years ago by the Commission created by the Agreement of August 10, 1922, and that there is an unpaid balance of these awards (R. 3). It is shown by the intervener-petitioner that it is the holder of

awards likewise rendered some years ago by the Commission, and that there is an unpaid balance (R. 23).

It is alleged in the complaint filed by each that the Lehigh Valley Railroad Company and others similarly situated presented claims to the Commission; that they were disallowed by a decision of the two Commissioners, the Empire participating on October 16, 1930; that about ten years later these claimants representing themselves to be holders of awards in their cases desire to have them paid; and that these awards are not awards of the Commission, since only one Commissioner was on the Commission at the time they were rendered, and the dismissal of the claims in 1930 is a final and binding decision.

Treaty and Statutory Provisions from Which Rights of Petitioners Are Derived,

The Treaty of Versailles embodied many detailed provisions obligating the Government of Germany to pay war indemnities to the governments with which Germany had been at war, called the Allied and Associated Powers, and in favor of their nationals.

The Government of the United States did not ratify the Treaty of Versailles, but on August 25, 1921, it concluded a separate treaty with Germany (42 Stat. Pt. 2, 1939) which secured to the United States and in favor of its nationals all the rights with regard to indemnities stipulated in the Treaty of Versailles, and, further, all rights, privileges, and indemnities specified in the Joint Resolution of the Congress of the United States of July 2, 1921 (42 Stat. 105).

For the purpose of giving effect to provisions of the Treaty of August 25, 1921, with regard to compensation to be paid to American citizens for injuries suffered with respect to rights of person and property, the United States and Germany concluded the Agreement of August 10, 1922, which established the Mixed Claims Commission.

In Article I are stated the categories of claims of citizens to be passed upon by the Commission (R. 16).

Article II of the agreement reads as follows:

"The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him."

Article VI reads in part as follows:

"The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments."

Section 2 of the so-called Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, reads in part as follows:

"Sec. 2(a) The Secretary of State shall, from time to time, *certify* to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the Agreement of August 10, 1922, between the United States and Germany (referred to in his Act as the 'Mixed Claims Commission'). (Italics inserted.)

"(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928."

Copies of the so-called awards have already been certified by the Secretary of State to the Secretary of the Treas-

ury. That was done after the plaintiff filed its complaint and evidently just before process was served on the Secretary of State. The Marshal endeavored to serve the Secretary through service on the legal adviser for the Department of State on the morning of October 31, 1939, but was unsuccessful. The legal adviser's assistant suggested that service on Mr. Hackworth, the legal adviser, be postponed until the following day, and the Marshal it seems temporarily abandoned his efforts to make service, but service was made on the afternoon of October 31 (R. 317). The necessary certificates covering the great number of so-called awards were sent to the Secretary of the Treasury on that day (R. 63-73, 110, 333).

Decision of the District Court.

Mr. Justice Bailey of the District Court held that the issuance of the certificates by the Secretary of State rendered the Court powerless to control the Secretary of the Treasury, and therefore powerless to prevent the payment of the claims to the Lehigh Valley Railroad Company and others. Mr. Justice Bailey referred to the contention of the plaintiff, that the so-called awards were not made by the Commission as the Commission could not function, since one of the Commissioners had resigned, and Mr. Justice Bailey expressed the opinion that that was the petitioner's strongest contention. However, he declared the claims to be claims of the United States, and he expressed the opinion that Congress had vested the Secretary of State with authority to pass on the question at issue, and whether he decided rightly or wrongly, the Court could not act (R. 295). The trial court's decision evidently was grounded on its interpretation of provisions in the Settlement of War Claims Act of 1928 relating to the functions and the extent of authority vested by that law in the Secretary of State.

Decision of the Court of Appeals.

The Court of Appeals affirmed the decision of the District Court evidently based on an interpretation of the Settlement of War Claims Act of 1928. But the appellate Court, in affirming the decision of the lower Court, undertook to dispose of the case by application of principles of constitutional law relating to distinctions between functions of the Judicial Department of the Government and functions of the Executive Department.

The appellate Court's decision is grounded on the theory that the disposition of the case "involves a political and not a judicial question". The decision appears to be based on two fundamental propositions. In the first place, the Court attributes to the appellants the contention, which it is said alone needs to be considered, namely, "that (1) the Mixed Claims Commission was without jurisdiction to make the awards of October 30, 1939". In the second place, the Court declares that the situation of the pending case "is clearly one of a continuing controversy between the United States and Germany although, paradoxically, neither government is a party to the present suit". The Court referred to some diplomatic exchanges between the Department of State and the German Embassy in Washington and declared that they show that the proceedings in the present case are of a political nature.

Specification of Errors.

The United States Court of Appeals erred:

1. In affirming the decision of the District Court which was based on an interpretation of provisions in the Settlement of War Claims Act of 1928 relating to the duties and the authority vested in the Secretary of State by that law.

2. In refusing to construe the Settlement of War Claims Act of 1928 and important international covenants incorporated by reference into and given effect by that statute;

3. In misconstruing principles of law relating to "political affairs", which under the Constitution are within the scope of authority vested in the Executive Department of the Government, and in holding that the questions requiring judicial determination were of a political nature and therefore excluded from judicial cognizance;

4. In holding that the proceeding instituted in the District Court is not a "case" susceptible of judicial determination;

5. In misconstruing the functions of the Commission created by the Agreement of August 10, 1922, and in failing to take account of private property rights of American citizens derived from that Agreement and from the Settlement of War Claims Act of 1928 and from decisions rendered in favor of the petitioners by the Commission under the Agreement of 1922.

Summary of Argument.

The Court does not specifically deal with the fundamental contentions which have been advanced by the petitioners. They have not contended that there can be any proceeding in the nature of a judicial review of acts of an international commission. They have found no fault with any act of the Commissioners or the Umpire performed conformably with the terms of the Agreement of August 10, 1922. They have not undertaken to bring about any judicial interference with the conduct of foreign affairs by executive authorities.

Fundamental Contentions of the Petitioners.

The petitioner brought this action in the District Court to protect property rights in funds on deposit in the Treasury of the United States amounting to approximately \$24,000,000 (R. 8). Those rights and the rights which the

intervener-petitioner undertook to protect are substantially identical. The rights have their foundation in (1) treaty stipulations concluded by the United States and Germany; (2) provisions of an agreement between the two countries to give effect to those treaty stipulations; and (3) statutory provisions enacted by Congress to give effect to both the treaty stipulations and the provisions of the supplemental agreement.

The petitioners have taken the position that the courts have the power to determine whether statutory provisions found in the Settlement of War Claims Act of 1928 would be properly or improperly executed, if action should be taken conformably to the prayers in the motion of the intervener-respondent for summary judgment presented to the District Court and in the motion of the defendants to dismiss the complaint and the bill of intervention. The law of 1928 of course contemplates the payment of valid awards only, that is, awards made in accordance with the terms of the Agreement of August 10, 1922. The petitioners have contended that, in passing on questions with regard to the execution of the law of 1928, the courts have the power to construe the pertinent international covenants, to determine whether or not valid awards were rendered through the acts of a single Commissioner and the Umpire. The Agreement of August 10, 1922, was incorporated by reference into the Settlement of War Claims Act of 1928. In construing and applying the statute, it is necessary and proper for the Court to construe the Agreement. The petitioners have invoked judicial action with the purpose of protecting important property rights.

Irregularities in Proceedings Resulting in the So-Called Awards of October 30, 1939.

The awards said to have been made in favor of the Lehigh Valley Railroad Company and others were not valid awards made by the Commissioners, nor by the Umpire. The so-called awards are not awards within the meaning of the

provisions of the Agreement of 1922, because they are not awards rendered conformably to the terms and requirements of the Agreement. They are simply individual acts of one Commissioner and the Umpire. Therefore, the payment of these so-called awards is not authorized by the Settlement of War Claims Act of 1928. Payment would be a misapplication of funds which are on deposit in the Treasury Department by virtue of the Settlement of War Claims Act.

Contentions now made by the petitioners with respect to pertinent stipulations of the Agreement of August 10, 1922, are in harmony with the sound construction put on them by counsel for the United States in the course of proceedings before the Claims Commission to have set aside the decision of the Commission dismissing in 1930 the claims of the Lehigh Valley Railroad Company and others. That construction counsel for the respondents, the two cabinet officers, do not now undertake to discard, but they argue the case involves political questions.

Distinction Between Judicial Questions and Political Questions.

A determination of the issues in the present case would not result in an interference by the Judiciary in political affairs arising in the conduct of foreign relations. Those issues involve justiciable questions and not so-called political questions, such as were controlling in numerous cases cited in the opinion of the Court of Appeals.

Some diplomatic exchanges referred to by the Court of Appeals have no bearing on questions pertaining to the power of courts of the United States to construe Federal statutory provisions and international covenants for the purpose of protecting private property rights or the interest of the Government, its material interests and its interest in the observance of international covenants.

This diplomatic correspondence does reveal facts to the effect that one party to the pertinent covenants has challenged the validity of acts which the petitioners contend are void (R. 195). It also reveals (R. 217) that the Secretary of State declined to enter into a diplomatic discussion of rules and principles of law determinative of questions as to the propriety of these acts which the petitioners contend cannot legally have the effect of disposing of the large funds on deposit in the Treasury.

The petitioners take the position that the Court has the power to pass on these questions so far as their proper disposition rests with the authorities of the Government of the United States. That is, the Court is competent to take appropriate action looking to a proper application of the Settlement of War Claims Act in the light of a rational interpretation of some unambiguous terms of the Agreement of August 10, 1922, terms of a very conventional character often employed in international practice.

A "Case" Within the Meaning of the Terms of Article III of the Constitution.

The proceeding instituted in the District Court is a "case" within the meaning of Article III, Section 2, Clause 1 of the Constitution. The Court is asked to deal with a legal controversy, which involves primarily a proper construction and application of a Federal statute. The performance of that function requires incidentally that the Court construe some international covenants. A court is not, for that reason, impotent to pass on the merits of the case.

The Court of Appeals, in its interpretation of the pertinent provisions of Article III of the Constitution, gave application to a faulty, too narrow concept of the scope of the authority of the Judiciary in the United States to interpret and to apply international covenants.

Argument.

POINT I.

The so-called awards rendered on October 30, 1939, are not awards rendered either by the Commissioners or by the Umpire in accordance with the provisions of the Agreement of August 10, 1922.

The Court of Appeals speaks of awards rendered in favor of the Lehigh Valley Railroad Company and others in 1939 as awards rendered by the "Commission" (p. 468). And the court seems to attribute to the petitioners a failure to distinguish between undisputed valid awards, such as they and others were granted by the Commission or by the Umpire, and so-called awards, the validity of which the petitioners have challenged, because they are not awards made conformably to the terms of the Agreement of August 10, 1922. The petitioners sought effectively to distinguish between clearly valid acts performed in accordance with the terms of the Agreement of 1922 and acts at variance with the Agreement. It is accordingly useful to indicate the manner in which awards can and must be made conformably to the requirements of the Agreement of 1922.

The Prescribed Method of Rendering Awards.

It is unnecessary to refer to general international practice with respect to the organization of international tribunals or commissions. The United States and Germany might have organized a tribunal or commission of three members by which cases could be decided by the unanimous or by the majority voice of the members. They chose to adopt another method of dealing with claims growing out of the war. The language of the Agreement of August 10, 1922, is so clear and precise that to attribute to it meanings

against the letter is precluded by proper application of the familiar rule that it is not permissible to interpret when there is no need of interpretation. That is a rule of international law as well as a rule of the domestic law of the United States applicable to the construction of treaty and statutory and constitutional provisions.

Vattel, *The Law of Nations*, Chitty's edition, Sec. 263, p. 244;

Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, Sec. 1179, p. 884; Sec. 1188, pp. 895-896;

Hall, *International Law*, 6th ed., Chap. 10, pp. 327-329;

Lake Country v. Rollins, 130 U. S. 662, 670-671;

The Amiable Isabella, 6 Wheaton, 1, 71, 72.

Cases can be decided by the joint action of the two Commissioners, or if the Commissioners disagree, by the sole decision of the Umpire. A single Commissioner can make no sole or partial disposition of a case. The Umpire has no functions in formulating a decision unless the Commissioners disagree. When they do disagree, the Umpire acts independently as a court of last resort, so to speak.

Account being taken of the explicit terms of the Agreement of 1922 with regard to the two methods by which cases could be decided, namely, by the concurrence of the Commissioners, or by the Umpire following disagreement by the Commissioners, it is interesting to note that the Court of Appeals recites in its opinion that, during the course of some deliberations in 1939, "the Umpire and the American Commissioner each expressed the view that the Commission's decision of October 16, 1930, had been induced by fraud". It is at least equally interesting to take note of the explicit statement found in the affidavit of Mr. Harold H. Martin (R. 85). He states that one of the grounds on which a rehearing by the Commission dismissing the claims of the Lehigh Valley Railroad and others in 1930

was "that the Commission had acted irregularly in arriving at its decision of October 16, 1930; in that the Umpire participated with the National Commissioners in their deliberations and thus deprived the United States of the independent judgment of the National Commissioners uninfluenced by the opinion of the Umpire" (R. 85). In the reply brief of the intervenier-respondent in opposition to the granting of writs of certiorari, it is stated on page 10 that "the German Commissioner, finding that the Umpire held views contrary to his on the questions of fraud and of Germany's responsibility for the explosions, retired as a member of the Commission". According to the terms of the Agreement of August 10, 1922, the case could not reach the Umpire in the regular way until the Commissioners had acted on it.

Clearly the Government of the United States was correct in 1931 with regard to its construction of the terms of the Agreement. The Umpire had no functions to decide a case or to participate in formulating a decision unless the Commissioners disagreed. He had no right to influence them; they had no right to undertake to influence him. However, it is not unnatural that counsel for the United States should not have succeeded in having the decision dismissing the claims declared to be a nullity. There was an agreement between two Commissioners in 1930. That in itself constituted a decision under the terms of the Agreement of 1922. That the United States was deprived of the independent judgment of the National Commissioners was a speculation. That there was no such unfortunate situation might reasonably be inferred from the fact that all three recorded themselves to be in agreement.

If, as the Government of the United States properly contended in 1931, the Umpire has no functions unless the Commissioners disagree, then the so-called awards of 1939 in reality are the awards of the American Commissioner. If he has the power to dispose of cases involving vast sums of money, the German Commissioner has the same power.

In view of the contentions advanced in 1931 by counsel acting under the direction of the Department of State, it is of course not strange that counsel for the Secretary of State in the pending case should not now argue that the Umpire could participate in the proceedings or that a case can be decided by one Commissioner and the Umpire. Contentions were submitted by counsel in behalf of the Secretary of State to the effect that the questions involved in the case are of a "political nature", and that the Court had no power to pass on the questions of statutory and treaty interpretation raised by the complaints filed by the plaintiffs in the trial Court.

It is also significant that the American Commissioner in his opinion in which he undertook to justify the disposition of the case by himself and the Umpire in the absence of the other National Commissioner relies on domestic cases concerned with private agreements relating to private arbitrations (R. 165-179). These cases in no way involve international covenants, and they have no international aspects and no application even by way of analogy to the questions involved in the present case. Particular reliance is placed by the Commissioner on *Colombia v. Cauca Company*, 190 U. S. 524. The Government of the United States may have used its good offices in facilitating a private adjustment between Colombia and an American citizen, but the arbitral arrangement was a private one, and the suit instituted by Colombia to set aside the award in that arbitration was a private litigation. That litigation was finally disposed of by a decision to the effect that, since the terms of the private agreement in that private arbitration permitted a rendition of an award by two arbitrators, the award rendered was not void because the third arbitrator had not participated in it. The Court in formulating its decision was of course not guided either by international covenants or by rules or principles of international law, but by the terms of the private contract construed in accordance with principles of domestic law. The same is true with respect to each of all the other private litigations cited by the Commis-

sioner. An interesting point in *Colombia v. Cauca* is the action of the Court in revising the arbitral award to the extent that it was outside of the scope of power conferred on the arbitral Commission by the terms of the arbitral agreement.

Effect of Noncompliance With International Covenants.

This Court has declared that a treaty should be interpreted "in a spirit of *uberrima fides*". *Tucker v. Alexandroff*, 183 U. S. 424, 437. That rule is binding not only on authorities of a government but also on members of judicial or quasi-judicial bodies established by international agreements.

This Court has also said that a court cannot "supply a *casus omissus* in a treaty any more than in a law". *The Amiable Isabella*, 6 Wheat. 1, 71. In the opinion in that case, Mr. Justice Story further said:

"The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret and enforce them. We can as little dispense with forms as with substance."

These principles are also applicable to acts of international commissioners or arbitrators. If arbitral agreements stipulate, as they generally do, by explicit provisions the finality of awards, commissioners or arbitrators cannot read into international agreements powers, which they might consider to be desirable, to alter or to set aside awards within a period of ten years or more or less.

Unobjectionable methods might be resorted to by a commission to defer final acts in cases with a view to possible desirable revisions. Tribunals or commissions generally are given powers to make appropriate rules of procedure.

In such cases there would seemingly be no objection for a rule providing for a period for presentation of motions for re-hearing and expressly withholding finality of decisions until after the lapse of the specified period. The Commission under the Agreement of August 10, 1922, had no such rule.

Commissions and tribunals have no inherent powers in the sense in which that term may be used in connection with the definition of the powers of a domestic court determined in the light of the historical development of the judiciary as distinguished from powers conferred by statutory or constitutional provisions. No analogy in this respect can be drawn between a domestic court and an international commission which has solely the powers conferred on it by the agreement by which two governments create it.

Any reason why the German Commissioner retired is of no relevancy to the legal question as to the right of the American Commissioner singly to decide a case, or to undertake to certify in his own behalf and in behalf of a retired German member a disagreement to the Umpire. It is immaterial whether the German Commissioner retired because he considered that the final awards dismissing certain claims in 1930 could not be nullified; or that the Umpire had no right to participate in proceedings of the Commissioners or to act until a case of disagreement of the Commissioners should be certified to him; or that, when the Commission was engaged in proceedings for one purpose, it should not undertake other proceedings; or that the Commissioner may have been prompted by an other motive. Under the terms of the Agreement of August 10, 1922, the effect on proceedings of the Commission is the same in case of the retirement of a member as in case of the death of a member. The records do not disclose that after the death of Mr. Chandler P. Anderson (R. 81) the German Commissioner undertook to decide any case or to certify a suppositions disagreement between himself and an

American member; nor is it shown that any attempt was previously made by an Umpire to decide a case under conditions such as those under which the so-called awards of October 30, 1939, were rendered.

POINT II.

A determination of the issues in the present case would not result in an interference by the Judiciary with political questions arising in the conduct of foreign relations.

The Scope of Political Questions.

Political questions within the exclusive competence of the Executive Department in the field of international relations obviously are those with which the Executive is concerned by virtue of authority delegated to him by the Constitution of the United States. The powers are stated in meagre language. But in determining their scope account must be taken of proper measures incident to their execution.

The President is Commander-in-Chief of the Army and Navy and of the Militia of the several States when called into service. By virtue of that post the President may conclude armistice agreements and of course make agreements with co-belligerents in a war. Article II, Section 2, Clause 1.

He has the power to make treaties, by and with the advice and consent of the Senate. Article II, Section 2, Clause 2. That power obviously involves the authority to conduct incidental negotiations, and it is well established that it also confers some authority to construe treaties in dealing with problems entering into international relations, although the final interpretation of treaties in the United States pertains to the Judiciary; confers also the power by proper methods to abrogate treaties.

The President has the power to appoint American diplomatic officials and consular officers, and of course it is well established that he has authority to direct those whom he appoints with reference to the discharge of their official duties, including those relating to the protection of the lives and property of the American nationals abroad. *Ibid.*

It is the duty of the President to receive foreign diplomatic officers, and by virtue of that authority he conducts correspondence with them with reference to matters concerning which they address the Government of the United States in behalf of their respective Governments. Article II, Section 3. It follows that with the Executive Department rests the authority to accord or withhold recognition of new states or new governments from time to time.

Citations on Which the Court of Appeals Relies.

The pending cases were instituted for the purpose of preventing the payment of funds at variance with the provisions of the Settlement of War Claims Act. The Court has the power to construe that law. The law requires the payment of awards rendered conformably to the Agreement of August 10, 1922. The Court has the power to interpret the terms of the Agreement to determine whether the purported awards rendered in 1929 are such valid awards.

These justiciable questions are not political questions such as those dealt with in the cases cited in the opinion of the Court of Appeals, namely, the recognition by the Executive of foreign states and foreign governments; the protection of American citizens abroad; complaints by one government against another government in relation to infractions of treaties and other matters; the abrogation of treaties; determinations with respect to official acts of foreign governments. Nor do the issues in the pending case involve questions of domestic law such as the delegation of legislative power to the Executive; the lack of the

authority of the courts to interfere when Congress passes an act in derogation of treaty stipulations; the refusal of American courts to enforce judicial process with respect to property of a foreign government as well as property of the United States. The petitioners did not invoke judicial action to control the Executive in relation to such matters. It may be observed further that some of the cases cited by the Court of Appeals are not concerned with the scope of judicial power to construe and to apply international covenants.

It is believed that brief references to cases cited by the Court of Appeals will serve to show the nature of each of the decisions rendered, and that they are in harmony with the above indicated views in relation to "political" questions and justiciable questions.

Oetjen v. Central Leather Co., 246 U. S. 297.

This case was an action in replevin. It was held that acts of General Francisco Villa in seizing property in Mexico could not be examined and modified by a New Jersey court in replevin. The Court declared that it was well established that the Judiciary would be bound by the decision of the Executive with regard to the recognition of governmental authorities in foreign countries.

Lehigh Valley Railroad Co. v. State of Russia, 21 Fed. (2d) 396.

The Government of Russia sued the railroad company for losses sustained in 1916. The Imperial Russian Government having been extinguished, a question was raised as to the right to maintain a suit for damages. The Court said that it would be bound by the action of the Executive Department with respect to the question of recognition of a governmental regime in Russia.

Holzendorf v. Hay, 20 App. D. C. 576.

This is a case in which the Court very naturally declined to issue a writ of mandamus to the Secretary of

State commanding him forthwith to institute "vigorous and proper proceedings against the Empire of Germany and the Emperor" thereof to recover damages in behalf of the petitioner.

Doe v. Braden, 16 How. 635.

This was an action of ejectment. While negotiations were pending between the United States and Spain for the cession of the Florida territory, the King of Spain made a grant of a vast tract of land to a Spanish nobleman. The Government of the United States insisted that, before exchange of ratifications of the treaty of cession should take place, it should be declared by the treaty that the grant was annulled. That was done. The claimant contended that the annulment was void. The Court said that it must apply the treaty as the law of the land, and that it could not look into the question whether the King of Spain had a right to declare the annulment embodied in the treaty of cession.

Williams v. Suffolk Insurance Company, 13 Pet. 415.

In this case the Court asserted that it felt bound by conclusions which the Executive had reached with regard to an assertion of jurisdiction over the Falkland Islands by the Government of Buenos Ayres.

The views heretofore expressed with regard to the scope of executive authority in dealing with international affairs seems to be clearly defined in the following passage from the opinion of the Court:

"In the case of *Foster v. Neilson*, 2 Pet. 253, 307, and *Garcia v. Lee*, 12 Ibid., 511, this Court have laid down the rule that the action of the political branches of the government in a matter that belongs to them, is conclusive."

Serilla v. Elizalde, 112 Fed. (2d) 29.

In this case it was held that the Court could not pass on qualifications of a resident Commissioner of the Philippine Islands in the United States partaking of the character of a foreign diplomatic representative.

Charlton v. Kelly, 229 U. S. 447.

This was an extradition case. Italy requested the surrender of an American citizen for trial. Over a long period the Italian Government had refused to surrender Italian subjects for trial in the United States. The Department of State was of the opinion that the treaty obligated each Government to surrender its own nationals, but the Executive had not seen fit to consider Italy's failure to do so an infraction of the treaty warranting the abrogation of the treaty by the United States. The Court referred to the well-known principle of law that the failure of one Government to observe treaty stipulations justifies the other contracting party in terminating the treaty, and the Court declared that, since the treaty had not been abrogated, the Court would enforce its provisions. The Court of course had no authority to give notice of the termination of the treaty which is a function of the Executive to be exercised in conjunction, perhaps, with the Senate.

United States v. Curtis-Wright Export Corporation et al., 299 U. S. 304.

In this case it was held that Congress had not undertaken to make an improper delegation of legislative power to the President under the joint resolution of Congress of May 24, 1934, c. 365, 48 Stat. 811, by which certain authority was conferred upon the President with regard to embargoes on the shipment of arms to American republics.

The Court differentiated between cases involving legislation authorizing the President to act as the agent of Congress in dealing with purely domestic affairs and cases

involving grants of authority to the President with reference to activities involving the affairs of other countries. It appears that the Court considered that, in cases of the latter kind, it was not necessary, in order to avoid delegation of legislative power, to prescribe, with respect to the ascertainment of facts, specified by Congress, the same kind of definite standards as must be fixed with reference to executive action in relation to purely domestic affairs.

United States v. Lee, 106 U. S. 196, 209.

Particular reference is made by the Court of Appeals to a passage in the opinion of the Supreme Court in which by way of illustration the latter referred to the immunity from judicial process of public ships and other property of foreign governments.

In this case the claimed privileged character of officials in charge of property taken by the United States was denied by the Court. Somewhat pertinent to issues in the pending case is the following passage in the Court's opinion:

"No man in this country is so high that he is above the law. No officer of the law may set aside that law with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it" (p. 220).

Marbury v. Madison, 1 Cranch 137, 165.

In the celebrated case in which the Supreme Court held that it had no power to issue a mandamus to the Secretary of State, that being an exercise of original jurisdiction not warranted by the Constitution, the Court in its opinion did enter into some discussion of acts of executive authorities exclusively within the competency of such authorities under the Constitution. It may be useful to quote, in addition to the passage used by the Court of Appeals, the following:

"The conclusion from this reasoning is, that where the heads of departments are the political or confi-

dential agents of the executive, merely to execute the will of the president or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable" (p. 166).

However, the following passage would seem to be even more apposite to the pending case:

"But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."

Unrelated Diplomatic Correspondence.

Under date of October 3, 1939, the German Charge d'Affaires *ad interim* addressed a note to the Secretary of State objecting to the so-called awards rendered by the Umpire and the American Commissioner in 1939. In this note, it was said that these so-called awards were void because actions of the Umpire and the Commissioner were at variance with terms of submission in the Agreement of August 10, 1922 (R. 195).

It is a well established rule of international law, invoked on several occasions by the Government of the United States, that acts at variance with the terms of submission of an agreement are void. Governments, parties to an international agreement, of course have the power to nullify objectionable awards.

Ralston, *The Law and Procedure of International Tribunals*, pp. 42 et seq.;

Moore, *International Law Digest*, Vol. VII, pp. 59-62.

A few pertinent quotations from authorities bearing on the subject may be cited:

Kamarowsky, *Le Tribunal International* (Westman's translation), p. 355:

"The violation of the agreement to arbitrate by the tribunal in any respect whatever."

Rivier, *Principes du Droit des Gens*, Vol. II, p. 185:

"* * * that the arbitrator has exceeded his powers or has not complied with the provisions of the *compromis*."

Hall, *A Treatise on International Law*, 5 ed., p. 363:

"* * * when the tribunal has clearly exceeded the powers given to it by the terms of the instrument of submission."

A reply to this note from the German Embassy was made by the Secretary of State under date of October 18, 1939 (R. 217). The position which he took seems to be unique. He declined to enter into "a discussion of the various complaints and protests" contained in the note. The Secretary of State expressed confidence in the ability and integrity of the Umpire and the American Commissioner and he said that the action of the German Commissioner in retiring "was apparently designed to frustrate or postpone indefinitely the work of the Commission". The Secretary did not discuss the legal effect of the Commissioner's retirement.

A determination of the question whether acts of the distinguished Umpire and the American Commissioner were in conformity with terms of submission in the Agreement of August 10, 1922, would not be a reflection on their ability and integrity.

In a report made by Secretary of State Bayard on the *Pelletier and Lazare* cases, S. Ex. Doc. 64, 49 Cong. 2d Sess., he said:

"The duty of the Executive to refuse to execute a decision which, in spite of the irreproachable character of the arbitrator, appears to be unjust and unfair, has been proclaimed many times by the Department of State and sanctioned by the Supreme Court of the United States."

It may be observed that the Government of the United States did not impeach the ability or integrity of the King of the Netherlands, when it refused to carry out his decision in the *Northeast Boundary* case. And the Government of Great Britain did not refuse to discuss the objections made by the United States to that decision but joined in setting aside the award. Moore, *International Law Digest*, Vol. VII, p. 59.

Likewise, the Government of Venezuela did not refuse to discuss with the Government of the United States the latter's protest against the award rendered by the Umpire in the *Orinoco Steamship Company* case on the ground that the Umpire had departed from the terms of submission, but the Venezuelan Government joined in having the Umpire's award passed upon by the Permanent Court of Arbitration at The Hague, which declared the award to be a nullity on the ground of a departure from the terms of submission. *American Journal of International Law*, 1911, Vol. 5, p. 230; *Foreign Relations of the United States*, 1909, p. 617.

The Government of the United States refused to accept the award of the Commissioners in the *Chamizal* Arbitration with Mexico and requested Mexico to undertake to reach another settlement of the boundary controversy involved in that case which Mexico at the time declared its willingness to do. *Foreign Relations of the United States*,

1911, p. 598. The action taken by the Government of the United States involved no reflection on the ability and integrity of the distinguished Canadian jurist, E. Lafleur, who rendered the award.

When the Government of the United States undertook to have declared to be a nullity the awards rendered by the two Commissioners and the Umpire dismissing the claims of the Lehigh Valley Railroad Company and others in 1930, it was probably not intended to reflect on the ability and integrity of the three distinguished gentlemen who rendered the awards, Messrs. Boyden, Anderson and Kieselbach (R. 80) even though it was charged that they had acted "irregularly" in that the Umpire, Mr. Boyden, participated with the National Commissioners in their deliberations and thus deprived the United States of the independent judgment of the National Commissioners "uninfluenced by the opinions of the Umpire" (R. 85). The charge evidently did imply that the two Commissioners had surrendered their independent judgment.

The German Government may or may not have learned of the filing of the present case after protest was made through diplomatic channels against acts of the Umpire and the American Commissioner. The Court of Appeals states that the exchange of communications brought the case of the appellants within the realm of political as distinguished from judicial questions. The case presented to the trial court is one in which the plaintiff undertook to secure proper application of the Settlement of the War Claims Act and to prevent action at variance with that law.

By passing on and protecting substantive rights created and secured by statutory provisions and treaty stipulations, the courts do not intervene in the conduct of foreign relations.

The Agreement of 1922 is concerned with both private and public interests, in that it specifies three classes of claims on which the Commission should pass: (1) "Claims of American citizens" with respect to damage to, or seizure

of, property interests within German territory; (2) other claims of "nationals" of the United States with respect to injuries to person or property; (3) claims for damage to which the United States was subjected (R. 16).

The Court of Appeals evidently misconstrued the nature of the Agreement of August 10, 1922. The purpose of the Agreement was to pass on claims against Germany. No provision was made for the presentation of any claims against the United States by Germany. The Court in its opinion refers to "claims of individual citizens presented by their respective governments", and says that the purpose of the Agreement "was to ascertain how much was due from one government to the other on account of the demands of their respective citizens." No such purpose is recited in the preamble or articles of the Agreement.

The Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, makes provision for the payment of claims against Germany, and sub-section 2(f) provides that "amounts awarded to the United States in respect of claims of the United States on its own behalf shall not be payable under this section."

In dealing with the question of the so-called "political" aspect of the pending litigation, it would assuredly be proper to take account of the American interest in the case as well as of the diplomatic notes having no relation to the case. The German Government is not concerned with the domestic legal instrumentalities employed in interpreting statutes and treaties in the United States. It is not finally bound by any method, judicial or administrative, used here in reaching interpretations of international covenants; nor is the Government of the United States bound by any unilateral interpretation adopted by Germany through administrative or judicial action. If the two governments are unable to agree, a final decision binding on both can be reached only through the decision of an international tribunal. Diplomatic exchanges evidently terminated with the refusal of the Secretary of State to discuss questions raised (R. 217).

The case instituted by the petitioners in the District Court is concerned in the first instance with the proper interpretation and execution of a Federal statute, the Settlement of War Claims Act. The respondents are officials of the United States who are represented by other officials. The law to be applied by the Court is the law of the United States. The funds in dispute are, as stated by the Court of Appeals, property of the United States and property which has been dedicated to specific purposes by Congressional enactment. If the funds are misapplied the United States will suffer the loss, unless it can be passed on to American claimants.

The Court of Appeals in its opinion says that "paradoxically, neither government is a party to the suit." It is true that suit was not brought against Germany, and Germany has instituted no action. It is also true that an action against an officer of the Government of the United States to require the proper execution of a statutory duty is not a suit against the Government. *Miguel v. McCarl*, 291 U. S. 442. It would therefore seem that it is paradoxical to say that an action against an official intended to protect property rights secured by statutory provisions is excluded from judicial cognizance as one that involves solely political questions arising in the conduct of the Government's foreign relations. Furthermore, the Secretary of the Treasury is not concerned with the administration of affairs of that nature. And the Secretary of State has declared that he considered it to be improper for him to discuss questions raised whether acts purporting to dispose of large sums of money were taken in conformity with the controlling covenants.

Status of Funds Created by the Settlement of War Claims Act.

The Court of Appeals cited a number of cases in connection with conclusions stated as to the nature of the proceedings before the Commission created by the Agreement of August 10, 1922, and as to the status of the funds estab-

lished by the Settlement of War Claims Act. In appraising a hearing of those cases it seems to be proper to take account of the Act of February 27, 1896, c. 34, 29 Stat. 32; Sec. 547, Tit. 31, U. S. C., which reads as follows:

"Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others shall be deposited and covered into the Treasury.

"The Secretary of State *shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.*

"Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for." (Italics inserted.)

The early cases cited antedated that law. Furthermore, it is of course necessary, and solely necessary, in order to determine the status and proper disposition of the fund created by the Settlement of the War Claims Act, to look to the pertinent provisions of that law.

The District Court and the Court of Appeals in their respective opinions referred to *Mellon et al. v. Orinoco Iron Co.*, 266 U. S. 121. The lower Court said that the case involved the ownership of a claim which had been allowed, and not the propriety of an allowance of a claim, but whether it has been allowed to the right party. The Court of Appeals declared that the sole issue in that case was the ownership of a specific fund received by the United States from Venezuela.

Orinoco Co., Ltd., et al. v. Orinoco Iron Co., 296 Fed. 965, 54 App. D. C. 218, was an appeal from a decree of the Supreme Court of the District of Columbia establish-

ing the equitable claim of the appellee to the sum of \$56,250 on deposit in the Treasury of the United States, and to prevent the payment of that sum to the Orinoco Co., Ltd.

Under a protocol concluded between the United States and Venezuela, the Department of State had collected from Venezuela a sum of \$385,000 in favor of the Orinoco Co., Ltd. and through its certificate had deposited that sum with the Secretary of the Treasury conformably to the requirement of the Act of February 27, 1896. *Treaties, Conventions, International Acts and Agreements*, Malloy, Vol. 2, p. 1889.

The Orinoco Iron Company had laid before the Department of State facts to show that it had an interest in the property which has been confiscated in Venezuela. The syllabus shows succinctly the disposition of the case by the Court of Appeals, which affirmed the decree of the trial court, p. 218:

"Where complainant has an equitable right as against the other complainants in a fund paid, pursuant to the terms of the protocol of a foreign country, into the United States Treasury as a trust fund for the beneficiaries thereof, under Act of February 27, 1896 (Comp. St. Sec. 6658), complainant has a right to equitable relief, though the Secretary of State denied complainant's request to recognize its claim."

In *Mellon et al. v. Orinoco Iron Co.*, 266 U. S. 121, the decree of the Court of Appeals was affirmed by the Supreme Court speaking through Mr. Chief Justice Taft. It is clearly shown by the action of all three courts that the certificate of the Secretary of State was not controlling with regard to the payment of money in satisfaction of the claim, and that the courts are not debarred from concerning themselves with the disposition of funds of this character.

The case does not appear to involve the ownership of a claim. The successful litigant was not the owner of the claim, in whole or in part, since he had not even presented a claim to the Department of State for presentation to the Government of Venezuela. The Orinoco Iron Company was not even mentioned in the protocol by which the claim against Venezuela was settled. It is therefore not perceived that it could have had any ownership in the fund awarded. But because money was wrongfully awarded the Orinoco Company, Ltd., and others, the Court imposed a trust on funds to which it considered the Orinoco Iron Company was entitled as compensation for losses actually sustained.

In other cases referred to by the Court in its opinion, equitable liens have been enforced against funds received by the Secretary of the Treasury through the Secretary of State. It can hardly be said that such cases involve the ownership of a claim, unless an equitable lien enforced against property should be regarded as ownership of property rather than a charge against property established by a court of equity in giving application to principles of justice to the relations of parties in litigation.

The Court did not consider itself to be debarred from taking jurisdiction in this case of the Orinoco Iron Company on the ground that judicial action would be an interference in political affairs. Yet the Government of Venezuela assuredly had an interest in the question whether money had erroneously been obtained by a business concern, which had not suffered the losses for which such compensation was paid. When the Department of State issued its certificate to the other company, and the Secretary of the Treasury proceeded to make payments conformably to the terms of the certificate, the Court put an end to further payment.

It is respectfully submitted that that case might be regarded as one involving some political questions, or international aspects. The *Orinoco* case was disposed of by competent authorities through appropriate diplomatic negotiations, but money was evidently erroneously collected in

behalf of a company not entitled to receive it, and the Court prevented complete payment. In the present case, the so-called awards of 1939 were not awards made conformably to methods prescribed by the United States and Germany in the Agreement of August 10, 1922. The Agreement was given effect by the Settlement of War Claims Act of 1928. For the purpose of protecting rights secured by that law, the petitioners undertook to obtain a judicial construction of it and incidentally a construction of terms of the Agreement of 1922, the legal effect of which the Secretary of State declined to discuss in diplomatic channels.

In *Mellon v. Harding, et al.*, Equity Suit No. 45,867, in the Supreme Court of the District of Columbia, decided on May 15, 1930, a bill was filed on July 13, 1926, by Secretary of the Treasury Mellon reciting that he brought the action as custodian of a trust fund. He named a large number of defendants, who were claimants to the fund as assignees or sub-assignees of John Celestin Landreau. Facts in the sense of the following were further recited in the bill:

In an arbitration between the United States and Peru, under a protocol signed May 21, 1921, a claim was presented by the Government of the United States against the Government of Peru to obtain an indemnity in behalf of heirs or assignees of Landreau.

The Secretary of State sent to the Secretary of the Treasury on or about August 30, 1924, two checks for \$125,000 and \$10,006.50, respectively, constituting the amount which had been awarded by the arbitral tribunal in satisfaction of the claim. The Secretary of State informed the Secretary of the Treasury that for various reasons the former was not competent to pass on the rights of the claimants to the fund and "to certify the names of those entitled to the trust fund". The Secretary of State, therefore, did not even issue any certificate conformably to the requirements of the Act of February 27, 1896.

The Secretary of the Treasury represented to the Court that he likewise could not pass on the rights of claimants, in this connection saying: "and plaintiff is ready and willing, so far as in his power lies, to pay and deliver said fund into the custody of this Honorable Court, or to such claimants as the Court may determine to be entitled thereto".

A Special Master was appointed by the Court, and he submitted a report making recommendations with regard to the distribution of the fund. The findings of the master were accepted by the Court, and an opinion disposing of the relative rights of claimants was filed on May 15, 1930.

Even in this relatively unimportant and simple case the Secretary of State felt that the rights of persons who asserted interests in the fund should be judicially determined. The Secretary of the Treasury took the same view and referred the entire situation to the Court, which took jurisdiction and passed on conflicting rights with reference to the trust fund.

The Court of Appeals in its discussions of the distribution of awards of *international* commissions, refers further to some cases involving questions relating to the procedure prescribed by Congress in dealing with cases passed upon by *domestic* commissions or boards created by statutes. The nature of these cases can be briefly indicated.

• *Comegys v. Vasse*, 1 Pet. 193.

In Article IV of the Treaty of February 22, 1819, between the United States and Spain, the two Governments made a mutual renunciation of claims against each other. The Court held that a decision of the Commission was final, but it declared that it did not necessarily follow that the Court was debarred from passing on conflicting assertions of rights with reference to an amount awarded, and that the decision of the Commission on the matter of conflicting assertions of right was beyond the scope of the Commission.

• *Williams v. Heard*, 140 U. S. 529.

A domestic "Court of Commissioners" was established by Congress to make a distribution of funds received by the United States from England in satisfaction of the celebrated so-called Alabama Claims. No appeal from its decisions was provided for by Congress. Its actions were, of course, in no way governed by any international covenants. The question decided in this case was whether a claim passed to assignees in bankruptcy as a part of their estate.

These above mentioned cases were decided by domestic bodies, so to speak, from whose decisions Congress naturally did not undertake to make any provisions for appeals to the courts. Neither the constitution of these bodies nor the legal status of awards rendered by them was governed by any international covenants.

Distinction Between Judicial Power and Executive Power.

A strangely unfortunate situation exists at present with reference to acts disposing of vast sums of money belonging to the United States and dedicated to specific purposes by Congress.

If the action taken by executive and by judicial authorities be correct, there is no governmental authority that is capable of determining whether such acts shall result in an improper or proper disposition of these funds. The Secretary of State has declared that he would not discuss objections made to acts of the Umpire and the American Commissioner. On the other hand, the Secretary's legal representatives in the pending case have advanced the contention, sustained by the Court of Appeals, that questions raised with regard to acts of the Umpire and the Commission are "political" over which the courts have no power to pass. It is respectfully submitted that the machinery of Government is not so unfortunately impotent.

In determining whether these cases instituted before the District Court involve non-justiciable, "political" ques-

tions, it is of course necessary to take account of the specific problems in relation to which the action of the Court was invoked.

Suit was instituted to prevent a misapplication of a Federal statute, the Settlement of War Claims Act. The fundamental question therefore pertains to the interpretation and application of that statute. Mr. Justice Bailey of the District Court did not declare that to be a political question. But he held that by the Settlement of War Claims Act Congress had through the terms relating to certification of awards vested in the Secretary of State powers which prevented a judicial determination of private rights secured by the Act of March 10, 1928, and the Agreement of August 10, 1922. It seems to be clear that the Secretary of State considered—correctly, it is submitted—that he was merely an agency of transmission of certifications of awards. That this is so appears to be clearly shown by the mechanical expedition with which the Department of State certified the numerous awards (R. 63-73, 110).

In construing the Settlement of War Claims Act, the second question requiring solution involves an interpretation of the pertinent clear provisions of the Agreement of August 10, 1922, to determine whether or not the statute would be properly or improperly executed, if the purported awards of 1939 should be paid. With the courts, of course, rest the final interpretation and application of Federal statutes. And the same is true with regard to stipulations of treaties. The courts have been concerned with such questions in hundreds of cases.

Among the numerous subjects dealt with by such decisions are the functions of consular officers, including duties in relation to the settlement of estates; matters of extradition; questions relating to protection of industrial property; rights under treaties and statutes relating to immigration; commercial matters, including the treatment of merchant vessels in foreign ports, and matters relating to customs; the conduct of business by aliens; titles to land; matters of taxation; rights in relation to inheritances.

Cases in the meaning of the term used in the Constitution can arise under such provisions. For a comprehensive summary of cases, see Crandall, *Treaties: Their Making and Enforcement*, 2nd edit., pages 466-634.

The petitioners did not petition the District Court to review any action of the Commission under the Agreement of August 10, 1922, or any act of the Umpire taken in conformity with the terms of the Agreement. They contended that some individual acts performed at variance with the agreement were not awards, the payment of which could properly be made under the Settlement of War Claims Act out of the fund created by that Act; that such acts performed in the absence of one Commissioner were not even within the forms of the law, so to speak; and that they are void.

The third question relates to diplomatic correspondence cited in the opinion of the Court of Appeals. Governments, parties to an international agreement, of course have the power to nullify objectionable awards, even in the absence of such exceptional circumstances as those of the present case, when one Commissioner undertook to act for both Commissioners, and the Umpire accepted such action as valid. Illustrations of the initiation by the Government of the United States of action to nullify awards have already been cited. The Secretary of State refused to discuss complaints made as to irregularities of such acts of the Commissioner and the Umpire. The petitioners in the present case did not ask the Court to interfere in any way in these diplomatic discussions. They did not attempt to have the Court direct the Secretary of State to consider these matters in conjunction with the complaining Government which he declined to do, intimating, it would seem, that such action on his part might be equivalent to intervening "directly or indirectly in the work of the Commission" (R. 217).

POINT III.

The proceeding instituted in the District Court is a "case" within the meaning of Article III, Section 2, Clause 1 of the Constitution.

The petitioners, in support of their contention as to the power of the Courts to pass on the issues raised in the present case, invoked Article VI, Clause 2, and Article III, Section 2, Clause 1, of the Constitution. With respect to the pertinent provisions of Article III the Court of Appeals in its opinion says:

"Since the case of *Ware v. Hylton*, decided by the Supreme Court in 1796, the courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature or the executive, and, accordingly, have consistently declined jurisdiction of such matters."

Judicial Power to Construe International Covenants.

It is respectfully submitted that the Court of Appeals gave application to a faulty, too narrow concept of the scope of the authority of the Judiciary in the United States to interpret, and to apply international covenants.

Treaties are compacts between nations. Governments alone can be called to account for infractions. American courts are empowered to pass on acts or omissions of authorities which result in the failure of the Government to observe treaty stipulations.

By Article VI, Clause 2, laws of the United States made pursuant to the Constitution are the supreme law of the land. If they are not made pursuant to the Constitution, they are regarded under our system as nonexistent. There is no reference in the Constitution to treaties made pursuant thereto. All treaties are parts of the supreme law of the land under the Constitution. Safeguards were pro-

vided against acts of the States of the Union that might result in contraventions of international obligations. The same is true with regard to acts of Federal authorities.

The provisions of Article III and Article VI of the Constitution were framed to establish a domestic legal machinery for giving effect to international obligations. It seems to be clear that that was the definite purpose of the framers. In giving just application to treaties, the courts uphold a rule of international law concerning the existence of which there is no question; the rule that asserts the sanctity of treaties and condemns the violation of such international covenants.

In Volume V of Moore's *Digest of International Law*, pages 233-243, is an interesting collection of diplomatic and judicial precedents, which furnish instructive, varied illustrations showing how this function of the courts has been upheld and exercised with respect to the vindication of both public and private rights secured by treaty stipulations.

Remedies in the courts may be inadequate for the most effective treatment of some problems involving questions pertaining to the observance of international covenants. And it is true, of course, that this Court has declared that, when Congress passes a law in derogation of a treaty, the courts will not interfere. *Head Money Cases*, 112 U. S. 580; *Whitney v. Robertson*, 124 U. S. 190.

The present case involves no such question. However, it is believed that the Supreme Court of the United States has never held that executive action in contravention of a treaty cannot be controlled by the Judiciary.

In the present case it is sought to prevent executive action at variance with both statutory provisions and international covenants. The courts will prevent unauthorized acts with reference to matters arising under an extradition treaty. *Rice v. Ames*, 180 U. S. 371. The courts will con-

trol executive action for the purpose of upholding treaty stipulations relating to immigration. *Chew Heong v. United States*, 112 U. S. 536. The courts will prevent executive action, in derogation of stipulations relating to customs duties. *Bantram v. Robertson*, 122 U. S. 116. The courts will protect, against executive action, property rights, including inchoate or complete titles to land, guaranteed by treaty stipulations. *Soulard v. United States*, 4 Pet. 511. International claims are property rights. *Phelps v. McDonald*, 99 U. S. 298; *Comegys v. Vasse*, 1 Pet. 193; *Metzger* case, *Venezuelan Arbitrations of 1903*, *Ralston's Report*, page 578. The courts have controlled executive action in construing treaty stipulations relating to rights of citizenship. *Perkins v. Elg*, 307 U. S. 325. In the last mentioned case, contentions were advanced by two cabinet officers with respect to international covenants pertaining to important personal rights, rights in relation to civil status, and those contentions were overruled by this Court, sustaining the decisions of two lower Federal courts.

Perhaps in most cases involving acts of executive authorities the public interest is greater and more far reaching than any individual private interest. Authorities of the Executive Department of the Government have been heard by the courts in cases in which the Government had no pecuniary interest and to which neither the Government nor any official of the Government was an original party. In such cases, the courts have taken account of a public interest, the proper interpretation of international covenants and the avoidance of difficulties growing out of differences of interpretation.

Sullivan, et al. v. Kidd, 254 U. S. 433, was an appeal from a decree of the United States District Court for the District of Kansas involving the interpretation of treaty provisions between the United States and Great Britain relating to the tenure and disposition of property by nationals of each of the two Governments. On May 17,

1920, this Court ordered that the Attorney General of the United States be notified of the pendency of the case, and the Solicitor General by special leave of court submitted a brief in behalf of the United States which set forth the Government's views respecting the pertinent treaty stipulations.

More interesting in relation to this point of the scope and purpose of judicial construction of international covenants is perhaps a case which arose in a State court, *In re Anderson's Estate*, 166 Iowa, 617. In that case, the Federal Government was allowed to become a party as intervener in the State court to present the Government's views with regard to the proper interpretation of treaty stipulations between the United States and Denmark relating to taxation. The legality of an inheritance tax was challenged in that action. The case was carried to the Supreme Court of the United States. *Peterson, et al. v. State of Iowa*, 245 U. S. 170.

In the present case, action by the Court to interpret the pertinent international covenants incidentally to the interpretation and application of the Settlement of War Claims Act is particularly appropriate and important, not alone because of the public and private pecuniary interests involved, but because the Secretary of State declined to discuss questions relating to the interpretation and application of those covenants.

Impartial judicial administration through a long line of decisions of both Federal and State courts in interpreting international covenants does not reveal that serious international political difficulties have arisen, because under the legal system obtaining in the United States, the Judiciary has had these very wide powers in construing such covenants. Doubtless the result has on the whole been just the reverse. Federal executive officials, including cabinet officers, have been parties in such cases.

There is no reason to vision consequent political complications, if, in the present controversy, the Court should

decide that the case can be tried on its merits, and that the courts may properly construe the simple and precise international covenants, which it is necessary to interpret and to apply in order to determine whether or not the purposes of the Settlement of War Claims Act would be properly carried out if payment should be made of the so-called awards said to have been rendered in behalf of the Lehigh Valley Railroad Company and others on October 30, 1939.

The Court of Appeals cites *Muskrat v. United States*, 219 U. S. 346, 357: In that case the Court held to be unconstitutional an act of Congress to confer jurisdiction on the Court of Claims, and appellate jurisdiction of the Supreme Court of the United States, to pass on the constitutionality of some acts of Congress affecting rights of Indians.

It is not difficult to understand that the Court should not consider that such a function was not an adjudication of a controversy, and that the Court did not consider that it had advisory or revisionary powers to pass on congressional statutes. In discussing judicial power conferred on the Supreme Court it was said in the opinion:

"That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."

CONCLUSION.

For the reasons above set forth, the decision of the Court below should be reversed.

Respectfully submitted,

FRED K. NIELSEN,
Attorney for Petitioner,
~~American-Hawaiian Steamship Company.~~

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FILE COPY



No. 381 and 382

United States Court of the District of Columbia

October 12, 1940

I. & T. AMERICAN REFRIGERATION CORPORATION, A DELAWARE CORPORATION; AMERICAN HAWAIIAN STEAMSHIP COMPANY (INTERVENOR); PETITIONERS.

CONTRA HILL, SECRETARY OF STATE, AND HERMAN MORGENTHAU, SECRETARY OF THE TREASURY, LEHIGH VALLEY RAILROAD COMPANY (INTERVENOR).

ON PETITION FOR WRIT OF HABEAS CORPUS TO REMOVE FROM STATES COURT ON ARREST FOR THE DISTRICT OF COLUMBIA.

FILED FOR RECORDING FILE NO. 381 AND 382 IN OFFICIALS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 381 and 382

**Z. & F. ASSETS REALIZATION CORPORATION, A DELA-
WARE CORPORATION; AMERICAN-HAWAIIAN STEAM-
SHIP COMPANY (INTERVENER), PETITIONERS**

v.

**CORDELL HULL, SECRETARY OF STATE, AND HENRY
MORGENTHAU, SECRETARY OF THE TREASURY; LE-
HIGH VALLEY RAILROAD COMPANY (INTERVENER)**

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA**

**BRIEF FOR RESPONDENTS HULL AND MORGENTHAU IN
OPPOSITION**

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 295) is reported in 31 F. Supp. 371. The opinion of the United States Court of Appeals for the District of Columbia (R. 335) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on June 3, 1940 (R. 354). The petitions for writs of certiorari were filed on August 29, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to enjoin the Secretary of the Treasury from paying an award certified by the Secretary of State, upon the ground that the American Commissioner and the Umpire who rendered the award were without authority to function as the ~~German~~ Mixed Claims Commission.

2. Whether the District Court had jurisdiction to enjoin the Secretary of the Treasury from paying an award certified by the Secretary of State, upon the ground that the Commission, even though properly constituted, was without authority to make the award.

STATUTES INVOLVED

1. The pertinent provisions of the Settlement of War Claims Act of 1928 (c. 167, 45 Stat. 254) are as follows:

SEC. 2 (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and

Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany * * *

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.

2. The English text of the Agreement of August 10, 1922, between the United States and Germany (42 Stat. 2200) is set forth in the Appendix, *infra*, pp. 19-22.

STATEMENT

On August 10, 1922, the United States and Germany entered into an agreement (42 Stat. 2200) providing for the establishment of a Mixed Claims Commission to ascertain and determine the amount to be paid by Germany in satisfaction of its financial obligations to the United States arising out of the first World War.¹ The Agreement provided for the appointment of one commissioner by the United States, one by Germany, and an umpire to be selected by agreement of the two governments

¹ The Knox-Porter Peace Resolution of July 2, 1921 (42 Stat. 105), which terminated the war between the two governments, reserved to the United States and its nationals all rights, privileges, indemnifications, and damages to which they were entitled under the Treaty of Versailles; and the peace treaty which followed, the Treaty of Berlin, concluded on August 25, 1921 (42 Stat. 1939), secured to the United States the rights reserved under the resolution.

(R. 16) "to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of the proceedings" (R. 17). Article VI declared that "The two Governments may designate agents and counsel who may present oral or written arguments to the commission" and that "The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments" (R. 18).

On March 10, 1928, the Congress enacted the Settlement of War Claims Act of 1928 (45 Stat. 254). The Act provided that twenty percent of the seized property of former German enemy nationals, together with funds contributed by the German government, should be paid into a special account, known as the German Special Deposit Account, to be applied to the payment of the awards of the Mixed Claims Commission. The statute authorized the Secretary of State to certify the awards of the Commission to the Secretary of the Treasury and directed the latter to make payments in amounts equal to the awards so certified. Sec. 2.

In 1927 the Agent of the United States filed claims with the Commission for damages arising out of the destruction of property by reason of explosions at Black Tom, New Jersey, in 1916, and at Kingsland, New Jersey, in 1917 (R. 35). These claims were dismissed by the Commission in 1930 (R. 35-36, 260-289). Petitions for rehearing were

denied on March 30, 1931 (R. 36), and a further petition for a rehearing on the basis of newly discovered evidence was also denied on December 3, 1932 (R. 36).

On May 4, 1933, the American Agent petitioned the Commission to reopen the case and to grant a rehearing, on the ground that the Commission had been misled in its 1930 decision by "fraudulent, incomplete, collusive and false evidence on the part of witnesses for Germany" (R. 36). The German ambassador informed the State Department that his government denied the power of the Commission to reopen the case (R. 123-124), but the Department took the position that the question was one for the determination of the Commission (R. 123). The American and German Commissioners disagreed on the question and the Umpire thereupon rendered a decision upholding the authority of the Commission to vacate its previous decisions and either to confirm or alter them as justice and right might require (R. 36, 45-59). After extensive hearings, the Commission, on June 3, 1936, rendered a decision, concurred in by the German Commissioner, setting aside its decision of December 3, 1932, denying a rehearing (R. 138-140). After the submission of additional evidence and extensive argument by the Agents of both governments, the Commission, on January 27, 1939, took the case under advisement (R. 38).

In the course of the Commission's deliberations, the American Commissioner and the Umpire both

expressed the opinion that, in rendering its decision of October 16, 1930, dismissing the claims, the Commission had been misled by false and fraudulent testimony (R. 60), and, at the request of the German Commissioner (R. 103), the Commission undertook to determine whether the proof of Germany's responsibility was sufficient to justify setting aside that decision (R. 149-150). On March 1, however, the German Commissioner addressed a note to the Umpire, declaring that the Commission was without power to reopen the case and that he was therefore withdrawing from the Commission (R. 39, 145, 148).

On June 7, 1939, the German Agent was given notice of a meeting of the Commission to be held on June 15, 1939 (R. 99). Thereupon, the German Chargé d'Affaires advised the State Department that his government considered the Commission "incompetent to make decisions" because of the withdrawal of the German Commissioner (R. 100), and the German Agent advised "that in view of the note addressed by my Government to the Department of State today, I shall not appear at the meeting" (R. 152-153, 154).

At the meeting of June 15, from which the German Commissioner was absent, the American Commissioner filed a Certificate of Disagreement (R. 154-179), and the Umpire rendered a decision, holding that the retirement of the German Commissioner did not divest the Commission of jurisdiction

to dispose of the claims and setting aside the decision of October 16, 1930 (R. 59-62, 179). The American Agent then moved that awards be made in favor of the United States (R. 105-106). The Commission granted the motion and found that the liability of Germany had been established (R. 106). The question of the amount of the awards was reserved for determination at a subsequent meeting, of which the German Agent was given notice (R. 179-180).

Thereafter, on October 3, 1939, the German Chargé d'Affaires again addressed a note (R. 195-216) to the Secretary of State, asserting that the proceedings involved "litigation between two sovereign Governments" (R. 213) and that the Commission was a "rump Commission" without any authority to enter an award (R. 214). In his reply of October 18, 1939, the Secretary of State declined to discuss the issues raised by the German note, expressed his complete confidence in the American Commissioner and the Umpire, and concluded with the observation that "I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion" (R. 217).

The Commission met on October 30, 1939, the German Commissioner again absenting himself from the meeting, and entered awards in favor of the United States (R. 107, 180, 181, 195). After the filing of this suit, but prior to the service of process on him (R. 311), the respondent Secretary of State certified the awards to the Secretary of the Treasury (R. 311-312) for payment.

The petitioner in No. 381, Z. & F. Assets Realization Corporation, brought suit to enjoin the Secretary of State from certifying, and the Secretary of the Treasury from paying, the sabotage awards of October 30, 1939 (R. 12), and to compel the Secretary of the Treasury to pay over the balance of the German Special Deposit Account to petitioner and others similarly situated (R. 12). The complaint (R. 1-12) alleged that the petitioner was a claimant under a prior award of the Commission (R. 2-3), that the funds remaining in the German Special Deposit Account were insufficient to pay all of the claims (R. 8), and that the payment of the sabotage claims would prevent petitioner from receiving payment in full (R. 8). The complaint further alleged that the sabotage awards were void, for the reason that the American Commissioner and the Umpire were without authority to function as the Commission (R. 6-7), that, even if properly constituted, the Commission was without authority to reopen the decision of 1930 dismissing the sabotage claims (R. 9), and that one of the awards in

favor of a domestic corporation was void for the reason that the capital stock of the beneficiary of the award was wholly owned by a Canadian corporation (R. 9-11). The American-Hawaiian Steamship Company, the petitioner in No. 382, filed a bill of intervention setting forth identical allegations (R. 31-32).

The respondents Hull and Morgenthau moved to dismiss the complaint and bill of intervention upon the ground that the questions presented were political in character and not subject to judicial cognizance (R. 294-295). The respondent Lehigh Valley Railroad Company, a claimant under the sabotage awards, intervened and filed an answer to the complaint and bill of intervention, together with a cross-claim for payment against the respondent Morgenthau (R. 33-44). The respondent-intervener also moved for a summary judgment dismissing the complaint and bill of intervention and granting the relief prayed for in its cross-claim (R. 44, 76).

The District Court granted the motion to dismiss (R. 299), upon the ground that the question whether the claims were properly allowed "was a question to be raised by the United States and not by individuals who might be wronged by the action of the Commission" (R. 297). Judgment on the cross-claim was reserved (R. 299). On appeal, the Court of Appeals for the District of Columbia held that the questions presented were political and

beyond the jurisdiction of the courts (R. 336-354). It therefore affirmed the judgment of the District Court (R. 354).

ARGUMENT

The pivotal issue before this Court is whether the action of the Secretary of State in certifying for payment by the Secretary of the Treasury certain sabotage awards by the Mixed Claims Commission may be challenged in a judicial proceeding.² The Government believes that the decision of the Court of Appeals for the District of Columbia, refusing to inquire judicially into the bases of the Secretary's action, is correct and in accordance with the principles established by the decisions of this Court.

The petitioners seek to challenge his action in these proceedings upon the following line of argument: they contend that, under Section 2 (a) of the Settlement of War Claims Act, the Secretary of State is authorized to certify only "awards" of the "Commission" and that the sabotage awards are not "awards" of the "Commission"; that the Act appropriates the funds in the German Special Deposit Account for the benefit of private persons entitled to payment under valid certified awards; that they, as the beneficiaries of other certified awards, have standing to sue to mandamus the Secretary of the Treasury to pay such awards; and,

² No issue arises as to the correct disposition by the Secretary of the Treasury of the funds in the German Special Deposit Account in the event the certification of the awards is regarded as valid or immune from judicial challenge.

since payment of the sabotage awards would diminish the funds available to pay their awards, that they may invoke the jurisdiction of the courts to overturn the certification of the sabotage awards and to enjoin their payment. This line of argument, we submit, is without substance.

1. The conclusive answer is that the authority of the Umpire and the American Commissioner to function as the Commission after the retirement of the German Commissioner, and the power of the Commission, if properly constituted, to enter the sabotage awards, have been conclusively determined by the Secretary of State and may not be made the subject of judicial inquiry.^a

(a) The present controversy is solely one between the United States and Germany. The claims for sabotage were claims of the United States against Germany, the challenged awards purported to establish the responsibility and liability of Germany to this Government, and any sum received or retained by the United States on account of the awards is the property of this nation prior to payment to private claimants. *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 458; *Wil-*

^a The Government here takes the position that, under general principles governing the separation of powers and under the Settlement of War Claims Act, no judicial inquiry into the validity of the certification should be made. But, in the event writs of certiorari should be granted, the Government reserves the right to argue that any attempt to authorize a judicial determination of this issue would be constitutionally invalid.

Williams v. Heard, 140 U. S. 529, 537-539; *Boynton v. Blaine*, 139 U. S. 306; *Frelinghuysen v. Key*, 110 U. S. 63, 71, 72. The right of private individuals asserting an interest in an award to compel payment to themselves is entirely dependent on statute. *Mellon v. Orinoco Iron Co.*, 266 U. S. 121; cf. *Cummings v. Deutsche Bank*, 300 U. S. 115, 121-124; *Houston v. Ormes*, 252 U. S. 469. The cases of *Comegys v. Vasse*, 1 Pet. 193, and *Judson v. Corcoran*, 17 How. 612, relied on by petitioners, involved the respective rights of private individuals after the payment of the award to one of the litigants. The United States upon the payment had there ceased to have any interest in the award. See also *Williams v. Heard*, *supra*; *Frevall v. Bache*, 14 Pet. 95.

The controversy between the two governments with respect to the competence and authority of the Commission under the Agreement of August 10, 1922, must be resolved by negotiations between the diplomatic representatives of the German government and the Executive Department, entrusted by the Constitution with the conduct of our foreign relations. *United States v. Diekelman*, 92 U. S. 520, 524; *Holzendorf v. Hay*, 20 App. D. C. 576, 580; Moore, *Digest*, VI, pp. 607-609. And the action of the Executive Department in the conduct of foreign affairs cannot be made the subject of judicial inquiry. Compare *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302; *Terlinden v. Ames*, 184 U. S. 270, 288; *Jones v. United States*, 137 U. S. 202, 212;

Doe v. Braden, 16 How. 635; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420; *Foster v. Neilson*, 2 Pet. 253, 313, 314. The rule is founded on the obvious consideration that the exercise of an antagonistic jurisdiction by the courts would embarrass the Government and undermine its position in the conduct of its foreign relations. *United States v. Lee*, 106 U. S. 196, 209. See *Deutsche Bank v. Cummings*, 65 App. D. C. 297, 305, reversed on other grounds, 300 U. S. 115.

It is settled, therefore, that the Secretary of State may reject an award of an international tribunal even after payment to the United States if, in his opinion, the claim on which the award is founded is unjust and inequitable. *La Abra Silver Mining Co. v. United States*, *supra*; *Boyn-ton v. Blaine*, *supra*; *Frelinghuysen v. Key*, *supra*. In the cases cited, reconsideration of the propriety of the claim had been authorized by an Act of Congress. But the decisions were expressly rested on the broad ground that the rejection or acceptance of an award is a matter committed to the determination of the political departments, and the State Department has long maintained its authority to reject an award even in the absence of such a statute. See the report of Secretary of State Bayard, Sen. Exec. Doc. No. 62, 49th Cong., 2d Sess.; Moore, *Digest*, VII, pp. 59-70. On like principle, the acceptance of an award by the Secretary of State must be deemed conclusive of its validity. The acceptance of an award, no less than its rejection,

involves the settlement of a controversy between the United States and a foreign government, in respect of which the action of the Executive Department is conclusive.*

The petitioners invoke the principle that the courts may construe the provisions of a treaty when private rights are involved. *Charlton v. Kelly*, 229 U. S. 447; *United States v. Rauscher*, 119 U. S. 407; *Cf. United States v. The Peggy*, 1 Cranch. 103; *The Florence H.*, 248 Fed. 1012 (S. D. N. Y.); *Tartar Chemical Co. v. United States*, 116 Fed. 726, 729 (S. D. N. Y.), reversed, 127 Fed. 944 (C. C. A. 2d). But it is not and cannot be suggested that the Agreement here involved reserves any rights to private individuals. Compare *La Abra Silver Mining Co. v. United States*, *supra*; *Boynton v. Blaine*, *supra*; *Frelinghuysen v. Key*, *supra*. See Administrative Decision No. II of the Mixed Claims Commission, United States and Germany, November 1, 1923 (Decs. & Ops., p. 8).

(b) The Settlement of the War Claims Act does not overturn these principles found by experience

* It is not clear from the record whether the Secretary of State accepted the judgment of the Umpire as his own or concluded that questions with respect to the Commission's jurisdiction and procedure were for the Commission to decide (R. 123, 217). In any event, the question whether, under the Agreement, the Commission was authorized to determine its jurisdiction and procedure is itself a subject for negotiations between the two governments and must be deemed a matter within the control of the Executive Department.

to be in accordance with the spirit of our institutions and does not withdraw from the Secretary of State the power to determine with finality the competence and authority of the Commission. On the contrary, it reinforces our position. Section 2 (a) refers to the Mixed Claims Commission, "established in pursuance of the Agreement of August 10, 1922, between the United States and Germany". The statute contains no provision for the settlement of disputes with respect to the jurisdiction or procedure of the Commission and plainly leaves the determination of such questions to the department entrusted with the conduct of our foreign relations. See *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 322-326. See Administrative Decision No. I of the Mixed Claims Commission (Decs. & Ops., p. 14). Section 2 (b) directs the Secretary of the Treasury to make payments only in accordance with awards certified by the Secretary of State. It does not aid petitioners. Rather, it is an explicit recognition of the authority of the State Department to accept or reject an award in its sole discretion. Section 4, on which petitioners rely, merely provides for the creation of the fund from which payments are to be made and for the manner of payment. It does not purport to modify in any way the authority of the Secretary of State to accept or reject an award.

The Secretary of the Treasury, under some circumstances, may be compelled by judicial process to pay the amount of a certified award to the claim-

ant named therein or to the person who has been adjudged, as against the named claimant, to be the equitable owner of the award. *Mellon v. Orinoco Iron Co.*, 266 U. S. 121, relied upon by petitioners, so holds. But, irrespective of the duty of the Secretary of the Treasury, in such circumstances, the case obviously does not aid the petitioners in their present endeavor to overthrow the certification issued by the Secretary of State. The sole issue in the *Orinoco* case was the ownership as between private litigants of a specified fund received by the United States from Venezuela under an award certified by the State Department. The certification of the award was not challenged. Rather, an assumption that the award as certified was valid, and hence susceptible of payment, was the foundation of the cause of action.⁵ The case at bar, on the contrary, is prosecuted neither by persons named in the sabotage awards nor by persons who assert an equitable right, as against the named claimants, to

⁵ The decision in the *Orinoco* case was based upon the Court's prior ruling in *Houston v. Ormes*, 252 U. S. 469, 473, that where Congress has appropriated a fund for the payment to a specified claimant, one who has an equitable interest in the fund as against the person so named may enjoin the Secretary of the Treasury from making payment to such person. See 266 U. S. at 125-126. And the decision in the *Houston* case, in turn, proceeds on the view that, since the Secretary was under a ministerial duty to pay the person named by Congress which could be enforced by mandate, the suit against the Secretary was a legitimate method of settling a controversy between the private persons. 252 U. S. at 473.

the payment of the awards as certified. Instead, the foundation of petitioners' case is the alleged invalidity of the awards as certified. This raises an issue, not involved in the *Orinoco* case, upon which the decision of the Executive branch is conclusive.

2. It is to be observed, moreover, that the petitioners have no standing to sue aside from such as may have been conferred upon them by statute. The funds deposited in the German Special Deposit Account are the property of the United States prior to payment of private claimants. *Cummings v. Deutsche Bank*, 300 U. S. 115, 120-124. Private claimants may compel payment only to the extent permitted by Section 2 (b) of the Settlement of War Claims Act and in the manner provided in the Act. See Secs. 2 (d), ¹ (c). Compare *Cummings v. Deutsche Bank*, *supra*; *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 458; *Williams v. Heard*, 140 U. S. 529, 537-539. But Section 2 (b), as pointed out above, does not entitle the petitioners to attack the certification and enjoin the payment of the sabotage awards. And the *Orinoco* and *Ormes* cases, far from supporting such an action, are premised upon the validity of the certification for payment by the Secretary of State. The responsibilities of the Secretary of the Treasury with respect to payment of the awards certified, does not embrace any duty on his part to question the certification issued by the Secretary of State. And, the fact that the Secretary of the

Treasury is "authorized and directed to pay * * * each award so certified" indicates that Congress intended that the prior determination by the Secretary of State should be conclusive. It is immaterial, therefore, whether or not the sabotage awards, if made the subject of a judicial inquiry, would be deemed "awards" of the "Commission" within the meaning of Section 2 (a).

CONCLUSION

The Government recognizes the important and unusual character of this case. It is submitted, however, that the decision of the Court of Appeals for the District of Columbia is correct and in accordance with the applicable decisions of this Court.

Respectfully,


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SEPTEMBER 1940.

APPENDIX

The Agreement of August 10, 1922, between the United States and Germany, 42 Stat. 2200, provided:

The United States of America
and
Germany,

being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany,
and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Wirth, Chancellor of the German Empire, who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The commission shall pass upon the following categories of claims which are more

particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interest, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die, or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They

may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V

Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any)

shall be accepted as final and binding upon the two Governments.

ARTICLE VII

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August 1922.

[SEAL]
[SEAL]

ALANSON B. HOUGHTON.
WIRTH.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 381 AND 382

Z. & F. ASSETS REALIZATION CORPORATION, A DELAWARE CORPORATION; AMERICAN-HAWAIIAN STEAMSHIP COMPANY (INTERVENER), PETITIONERS

v.

CORDELL HULL, SECRETARY OF STATE, AND HENRY MORGENTHAU, SECRETARY OF THE TREASURY; LEHIGH VALLEY RAILROAD COMPANY (INTERVENER)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS HULL AND MORGENTHAU

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 295) is reported in 31 F. Supp. 371. The opinion of the United States Court of Appeals for the District of Columbia (R. 335) is reported in 114 F. (2d) 464.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on

June 3, 1940 (R. 354). The petitions for writs of certiorari were filed on August 29, 1940, and granted on October 14, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to enjoin the Secretary of State from certifying, and the Secretary of the Treasury from paying, an award upon the ground that the American Commissioner and the Umpire who rendered the award were without authority to function as the Mixed Claims Commission, United States and Germany.

2. Whether the District Court had jurisdiction to enjoin the Secretary of State from certifying, and the Secretary of the Treasury from paying, an award under the provisions of the Agreement of August 10, 1922, between United States and Germany and under the Settlement of War Claims Act of 1928 upon the ground that the Commission, even though properly constituted, was without authority to make the award.

STATUTES INVOLVED

1. The pertinent provisions of Section 2 of the Settlement of War Claims Act of 1928 (c. 167, 45 Stat. 254) are as follows:

SEC. 2 (a) The Secretary of State shall, from time to time, certify to the Secretary

of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany * * *

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.

2. The English text of the Agreement of August 10, 1922, between the United States and Germany (42 Stat. 2200) is set forth in the Appendix, *infra*, pp. 49-52.

3. Section 4 of the Settlement of War Claims Act, creating the German Special Deposit Account and establishing the order of priority of payments out of the fund, is set forth in the Appendix, *infra*, pp. 52-57.

STATEMENT

On August 10, 1922, the United States and Germany entered into an agreement (42 Stat. 2200) providing for the establishment of a Mixed Claims Commission to ascertain and determine the amount to be paid by Germany in satisfaction of its financial obligations to the United States arising out of the first World War.¹ The Agreement provided

¹ The Joint Resolution of July 2, 1921 (42 Stat. 105), which terminated the war between the two countries, reserved to the United States and its nationals all rights, privileges, indemnifications, and damages to which they were entitled under the Treaty of Versailles; and the peace treaty

for the appointment of one Commissioner by the United States, one by Germany, and an umpire to be selected by agreement of the two governments (R. 16) "to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of the proceedings" (R. 17). Article VI declared that "The two Governments may designate agents and counsel who may present oral or written arguments to the commission" and that "The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments" (R. 18):

On March 10, 1928, the Congress enacted the Settlement of War Claims Act of 1928 (45 Stat. 254). The Act provided that twenty percent of the seized property of former German enemy nationals, together with funds contributed by the German government, and a sum appropriated by Congress in respect of claims of the German government on behalf of its nationals, should be paid into a special account, known as the German Special Deposit Account, to be applied to the payment of the awards of the Mixed Claims Commission. The statute authorized the Secretary of State to certify the

which followed, the Treaty of Berlin, concluded on August 25, 1921 (42 Stat. 1939), secured to the United States the rights reserved under the Joint Resolution. The above-mentioned Agreement of August 10, 1922, between United States and Germany was executed in pursuance of the Treaty of Berlin.

awards of the Commission to the Secretary of the Treasury and directed the latter to make payments in amounts equal to the awards so certified in the manner and order prescribed by the Act. Secs. 2, 4. Provision was made that payments under the Act should not extinguish the liability of Germany for the full satisfaction of all awards (Sec. 2 (b)), and Germany has given bonds to secure payment of all awards (R. 351-352).

In 1927 the Agent of the United States filed claims with the Commission for damages arising out of the destruction of property by reason of explosions at Black Tom, New Jersey, in 1916, and at Kingsland, New Jersey, in 1917 (R. 35). These claims were dismissed by the Commission in 1930 (R. 35-36, 260-289). Petitions for rehearing were denied on March 30, 1931 (R. 36), and a further petition for a rehearing on the basis of newly discovered evidence was also denied on December 3, 1932 (R. 36).

On May 4, 1933, the American Agent petitioned the Commission to reopen the cases and to grant a rehearing, on the ground that the Commission had been misled in its 1930 decision by "fraudulent, incomplete, collusive and false evidence on the part of witnesses for Germany" (R. 36). The German Ambassador informed the State Department that his government denied the power of the Commission to reopen the cases, saying "The German Government regards the commission as being without authority to pass upon a difference of opinion

which may exist between the two governments in this connection" (R. 124). But the State Department took the position that the question was one for the determination of the Commission (R. 123). The American and German Commissioners disagreed² on the question and the Umpire thereupon, on December 15, 1933, rendered a decision upholding the authority of the Commission to vacate its previous decisions (R. 36, 45-59). He concluded that "the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand" (R. 59). An exchange of notes between the two governments during the following year (1934) recognized that these sabotage cases were pending before the Commission (R. 135-137). After extensive hearings, the Commission, on June 3, 1936, rendered a decision, concurred in by the German Commissioner, setting aside its decision of December 3, 1932, which had denied a rehearing (R. 138-140). The decision of June 3, 1936, provided for a hearing limited to the question of whether a rehearing should be granted (R. 96).

² Although the Commissioners had in fact disagreed there was absent the usual joint certificate of disagreement, and the Umpire had to decide first whether such actual disagreement was sufficient to give him jurisdiction. He concluded in favor of jurisdiction (R. 50-52).

But notwithstanding the limitation upon the scope of the hearing, the Commission on December 1, 1937, authorized the German Agent to file any evidence he desired, and the cases were apparently fully tried, argued and briefed on the merits by both sides (R. 157-158). And since all of the evidence bearing on the merits had been submitted, the American Agent requested that both questions should be decided without further hearing (R. 97-98). After extensive argument by the Agents of both governments, the Commission, on January 27, 1939, "entered upon its deliberations on the questions presented by the pleadings, briefs and oral argument" (R. 98-99).

In the course of the Commission's deliberations, the American Commissioner and the Umpire both expressed the opinion that, in rendering its decision of October 16, 1930, dismissing the claims, the Commission had been misled by false and fraudulent testimony (R. 60), and, at the request of the German Commissioner (R. 103), the Commission undertook to determine whether the proof of Germany's responsibility was sufficient to justify setting aside that decision (R. 149-150).³ On March 1, 1939, however, the German Commissioner addressed a note to the Umpire, charging him with bias, declaring that the Commission was proceeding

³The German Commissioner had apparently suggested that the Commission investigate whether the United States had affirmatively proved its case, presumably on the theory that it would be unnecessary to grant a rehearing if the United States had not made out a case on the merits.

unfairly in its reconsideration of the claims and advising that he was therefore withdrawing from the Commission (R. 39, 145, 148).

On June 7, 1939, the German Agent was given notice of a meeting of the Commission to be held on June 15, 1939 (R. 99). Thereupon, the German Charge d'Affaires advised the State Department that his government considered the Commission "incompetent to make decisions" because of the withdrawal of the German Commissioner, and added that "the Government of the Reich will ignore the decision to call the meeting on June 15th * * *" (R. 100, 153-154). And the German Agent advised the American Joint Secretary of the Commission "that in view of the note addressed by my Government to the Department of State today, I shall not appear at the meeting" (R. 152-153, 154).

At the meeting of June 15, from which the German Commissioner was absent, the American Commissioner filed a Certificate of Disagreement (R. 154-179), and the Umpire rendered a decision, holding that the retirement of the German Commissioner did not divest the Commission of jurisdiction to dispose of the claims and setting aside the decision of October 16, 1930 (R. 59-62, 179). The American Agent then moved that awards be made in favor of the United States (R. 105-106). The Commission granted the motion and found that the liability of Germany had been established (R. 106). The question of the amount of the

awards was reserved for determination at a subsequent meeting to be held on October 30, 1939, of which the German Agent was given notice (R. 179-180).

Thereafter, on October 3, 1939, the German Chargé d'Affaires again addressed a note (R. 195-216) to the Secretary of State, asserting that the proceedings involved "litigation between two sovereign Governments" (R. 213) and that the Commission was a "rump Commission" without any authority to enter an award (R. 214). The Umpire was repeatedly referred to as the "American" Umpire (e. g., R. 197, 198, 199). The note declared that, while the withdrawal of the German Commissioner did not render the Commission "*functus officio*," it did deprive the American Commissioner and the Umpire of any authority to exercise the functions of the Commission under the Agreement (R. 198-199); that there was no "disagreement" between the American and the German Commissioners and hence the Umpire was without any justification for rendering a decision (R. 199-203); that the claims on behalf of the Agency of Canadian Car & Foundry Company were beyond the jurisdiction of the Commission because all of the stock of the corporation was owned by a Canadian corporation domiciled in Montreal (R. 207-208); and that the Umpire had erroneously considered and decided not merely the question of reopening the decision of 1930 but set aside that decision and found against Germany (R. 209-214). The note declared that, by reason of these alleged

irregularities, any awards that the American Commissioner and the Umpire might render "can never form the basis for a financial obligation of Germany" (R. 215) and concluded with the statement that "By direction of my Government I therefore raise once more the most emphatic representations against" the alleged illegal acts (R. 215).

In his reply of October 18, 1939, the Secretary of State declined to discuss the issues raised by the German note, and refused to "endeavor, in the slightest manner, to determine the course" of the proceedings of the Commission; he expressed his complete confidence in the American Commissioner and the Umpire, and concluded with the observation that "I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion" (R. 217).

The Commission met on October 30, 1939, the German Commissioner again absenting himself from the meeting, and entered awards in specified amounts in favor of the United States (R. 107, 180, 181, 195). On October 31, 1939, after the filing of this suit, but prior to the service of process on him (R. 311), the respondent Secretary of State certi-

fied the awards to the Secretary of the Treasury (R. 311-312) for payment.*

The petitioner in No. 381, Z. & F. Assets Realization Corporation, brought suit to enjoin the Secretary of State from certifying, and the Secretary of the Treasury from paying, the sabotage awards of October 30, 1939 (R. 12), to compel the Secretary of the Treasury to pay over the balance of the German Special Deposit Account to petitioner and others similarly situated (R. 12), and for a declaratory judgment that the sabotage awards were invalid (R. 12). The complaint (R. 1-12) alleged that the petitioner was a claimant under a prior award of the Commission (R. 2-3), that the funds remaining in the German Special Deposit Account were insufficient to pay all of the claims.* (R. 8), that Germany has been in arrears of payments for many years under the Debt Funding Agreement of June 1930, and that there is no way

* It is not clear from the record whether the Secretary of State accepted the judgment of the Umpire as his own or concluded that questions with respect to the Commission's jurisdiction and procedure were for the Commission to decide (R. 123, 217). It is clear, however, that during the years 1933 to 1939 the Secretary and the Department of State had fully considered the views of the German Government, of the German Commissioner, and of the petitioner in No. 381 itself as to the proceedings of the Commission and the validity of the awards (R. 123-4, 135-7, 150, 195, 216-7, 291, 305-311, 312-317).

* The total principal amount of awards to petitioner Z & F Assets Realization Corporation is \$839,998.40, and this petitioner has already been paid an amount in excess thereof, namely, \$864,050 (R. 111). Petitioner American-

of compelling Germany to make said payments (R. 8-9). The complaint further alleged that the sabotage awards were void, for the reason that the American Commissioner and the Umpire were without authority to function as the Commission (R. 6-7), that, even if properly constituted, the Commission was without authority to reopen the decision of 1930 dismissing the sabotage claims (R. 9), and that one of the awards in favor of a domestic corporation was void for the reason that the capital stock of the beneficiary of the award was wholly owned by a Canadian corporation (R. 9-11). The American-Hawaiian Steamship Company, the petitioner in No. 382, filed a bill of intervention setting forth substantially identical allegations (R. 31-32).

Hawaiian Steamship Company has awards in the aggregate principal amount of \$3,044,125.00, and it has received payments in the amount of \$3,309,906.69 (R. 75). Moreover, every holder of awards except the sabotage claimants have received "payment in full of their claims, together with interest to date of payment, or amounts equal to not less than approximately 100% of the principal amount of such awards." "In the great majority of cases said holders of awards remaining unpaid have received more than the principal amount of said awards" (R. 111). In many, if not all, instances, payments received by awardholders have been designated as part principal and part interest. But regardless of the designation, it has been settled, at least for income-tax purposes, that all amounts received must be treated as principal until the principal amount has been fully paid. *Helvering v. Drier*, 79 F. (2d) 501 (C. C. A. 4th); *Drier v. Helvering*, 72 F. (2d) 76 (App. D. C.); *Commissioner v. Speyer*, 77 F. (2d) 824 (C. C. A. 2d), certiorari denied, 296 U. S. 631; *Commissioner v. Ullmann*, 77 F. (2d) 827 (C. C. A. 2d), certiorari denied, 296 U. S. 631.

The respondents Hull and Morgenthau moved to dismiss the complaint and bill of intervention upon the ground that the questions presented were political in character and not subject to judicial cognizance (R. 294-295). The respondent Lehigh Valley Railroad Company, a claimant under the sabotage awards, intervened and filed an answer to the complaint and bill of intervention, together with a cross-claim for payment against the respondent Morgenthau (R. 33-44). The respondent intervener also moved for a summary judgment dismissing the complaint and bill of intervention and granting the relief prayed for in its cross-claim (R. 44, 76).

The District Court granted the motion to dismiss (R. 299) upon the ground that the question whether the claims were properly allowed "was a question to be raised by the United States and not by individuals who might be wronged by the action of the Commission" (R. 297). Judgment on the cross-claim was reserved (R. 299). On appeal, the Court of Appeals held that the questions presented were political and beyond the jurisdiction of the courts (R. 336-354). It therefore affirmed the judgment of the District Court (R. 354).

SUMMARY OF ARGUMENT

I

Since foreign governments are immune from unconsented suit, the claims of American nationals

against Germany must be settled through diplomatic channels. The immunity of foreign sovereigns is complete and extends even to property of such governments within the territorial jurisdiction of our courts. The doctrine of immunity is thus a recognition of the principle that such controversies should be settled by political and not by judicial means.

The executive department was at liberty to present the claims of American nationals or not in its sole discretion. And by espousing the claims the Government made them its own. The funds retained or received from Germany in payment of the claims are likewise the property of the United States until payment is made to the private claimants. The Government may be under a "moral" obligation to make payment, but no private individual has any legal or equitable interest in the funds until payment to the claimant. Such is the settled doctrine as to the respective interests of the Government and private claimants under treaties identical in character with the Agreement of August 10, 1922.

Apart from statute, therefore, the executive department, acting through the Secretary of State, may accept or reject an award in its sole discretion until payment has been made to the private claimant. The action of the Secretary involves the conduct of our foreign affairs, entrusted by the Constitution to the executive department, and his action cannot therefore be reviewed in the courts unless the Congress has expressly so provided.

While the courts may exercise an "antagonistic jurisdiction" where private rights are involved, no such rights are here involved apart from statute. The cases sustaining the power of the courts to determine the issue of ownership of the claim as between private persons after the Government has made payment to a claimant expressly recognize the conclusive effect of the decision of the political department on the question of the validity of the award.

In brief, the Secretary of State had authority even in the absence of a statutory grant to determine the validity of the sabotage claims against Germany. The authority of the Secretary is in no way dependent on the nature of the objection to the award, and extends to the disposition of all questions going to the validity of the award, whether they involve the merits of the claims or the "jurisdiction" of the Commission ~~or~~ Umpire. In practice this authority has been exercised for almost one hundred and fifty years. And, in principle, it can make no difference what the ground of the objection to the award may be. To overturn the decision of the Secretary in rejecting an award is to precipitate a controversy with a foreign power which the courts are powerless to settle. To reverse an acceptance of an award is to place a grave restriction on the authority of the executive department to conduct foreign affairs, a restriction from which all other sovereign nations are free.

The Settlement of War Claims Act does not purport to restrict in any way the power which the Secretary of State would otherwise enjoy to accept or reject the sabotage awards. The sole purpose of the Act in this aspect was to make provision for the deposit of the funds held for payment of awards, and to establish a method of payment after all political questions affecting the validity of the award had been settled by the certificate of the Secretary of State. The courts have power to adjudicate the ownership of the claim as between private persons; on this question the State Department has never purported to pass. But the courts may not review the decision of the Secretary of State on the validity of the award—a political question.

II

If it be assumed that the executive department has otherwise no authority to determine the validity of the sabotage awards apart from statute, the Settlement of War Claims Act should be construed to confer such authority. Since the funds in the German Special Deposit Account are the property of the United States, Congress undoubtedly has constitutional power to commit final determination to an executive agency. Such, we submit, must be deemed the intention of Congress.

The Congress could not have intended that all controversies arising between the two Governments should be resolved in the first instance by the courts. Either the Congress intended that the decision of the Commission or Umpire should be

conclusive on all issues, or that the Secretary should have power to decide any question arising between the two Governments with respect to a claim submitted to the Commission. And since Congress made no provision for judicial review, in either view the courts may not reexamine the question of the validity of the sabotage awards.

ARGUMENT

I

THE QUESTION OF THE VALIDITY OF THE SABOTAGE AWARDS IS OF A POLITICAL CHARACTER, IS CONCLUSIVELY DETERMINED BY THE CERTIFICATE OF THE SECRETARY OF STATE, AND IS NOT OPEN TO JUDICIAL INQUIRY

The petitioners contend that, under the provisions of the Settlement of War Claims Act, private persons claiming under a valid award have a property interest in the funds in the German Special Deposit Account, that the courts have jurisdiction to construe treaty provisions, whenever private rights are involved, and that the courts may, therefore, determine whether the Umpire and the American Commissioner had power under the Agreement of August 10, 1922, to function as the Commission and render the awards. It is further contended that the payment of the sabotage awards would deplete the funds available for the payment of the awards in which petitioners are interested, and that therefore they are entitled to equitable relief.

The petitioners' contentions are without substance.

In submitting the claims of its nationals against Germany to the Mixed Claims Commission, the United States made the claims its own, and the funds retained by the United States or received from Germany in satisfaction of the awards of the commission are the property of the United States. The Government is under no legal or equitable duty to distribute such funds, whatever may be its moral obligation to do so. The differences between the United States and Germany as to the validity of the sabotage awards, therefore, involve political questions and the decision of the executive department with respect to such questions is conclusive, and is not subject to judicial review. Apart from statute, private claimants have no legal or equitable right to compel payment, and the Settlement of War Claims Act, in authorizing the Secretary of the Treasury to pay awards certified by the Secretary of State, recognizes and confirms the authority of the executive department to determine conclusively the validity of the awards.

A. APART FROM STATUTE, THE QUESTION OF THE VALIDITY OF THE SABOTAGE AWARDS IS FOR THE EXCLUSIVE DETERMINATION OF THE EXECUTIVE DEPARTMENT

1. *The claims of American nationals against Germany presented to the Commission are the claims of the United States, and funds held by the United States for the payment of awards are the property of the United States until paid to the private claimants*

Since foreign governments are not subject to unconsented suit, the claims of American nationals

against such governments may be prosecuted "not by suit in the courts, as of right, but by diplomacy, or, if need be, by war" *United States v. Diekelman*, 92 U. S. 520, 524; *Frelinghuysen v. Key*, 110 U. S. 63, 72; *Boynton v. Blaine*, 139 U. S. 306, 323; *Gardner v. Clarke*, 9 Mackey, (D. C.) 261, 264; *Wolfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 376. The immunity of a foreign sovereign from suit, it should be observed, does not rest on want of judicial power alone. For reasons of comity, the courts of one country decline to entertain proceedings against foreign sovereigns even where the person or property of such sovereign is found within the territorial jurisdiction of the domestic court. *The Exchange*, 7 Cranch 116; *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2d); *The Parlement Belge* [1880], 5 P. D. 197; *Duke of Brunswick v. King of Hanover* [1844], 6 Beav. 1, 37, 38; see Hayes, *Private Claims Against Foreign Sovereigns*, 38 Harv. L. Rev. 599. The courts will exercise jurisdiction of an action involving a claim on behalf of a national of one sovereign against another nation only with the consent of the governments. Cf. *United States v. Diekelman*, 92 U. S. 520, 524; *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 455-463. The immunity of the foreign sovereign thus reflects the conclusion that "the controversy is more properly settled by diplomacy, or international courts or

war." Jaffe, *Judicial Aspects of Foreign Relations* (1933), p. 51.

The Government in its discretion may agree or refuse to espouse the claim of its nationals. *Holzenhof v. Hay*, 20 App. D. C. 576, 580. And when the United States "assumed the responsibility" of presenting to the Commission the claims of its nationals against Germany, it made the claims "its own." *Boynton v. Blaine*, supra, at 323; *Great Western Ins. Co. v. United States*, 19 C. Cls. 206, 217-218, aff'd on other grounds, 112 U. S. 193; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 356-357. Such has been the "consistent doctrine" of the State Department in presenting a claim of an American national to any other government. See Opinion of the Solicitor of the Department of State, *Distribution of Alsop Award*, p. 14.

The *Frelinghuysen* and *Boynton* cases involved the Convention between the United States and Mexico, of July 4, 1868, 15 Stat. 679, which provided for the establishment of a mixed claims commission to pass upon and make individual awards in respect of claims presented on behalf of private claimants, required the commission "to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective governments in support of or in answer to any claims, and to hear, if required, one person on each side on behalf of each government on each

and every separate claim", and to render decisions "upon such evidence or information only as shall be furnished by or on behalf of their respective governments." The pertinent provisions of the Agreement of August 10, 1922, are substantially identical. Under the agreement, the Commission was authorized to consider claims presented on behalf of American nationals (Art. I, Appendix, *infra*, pp. 49-50). The Agreement provided, moreover, that the "two Governments" were to designate agents and counsel to present arguments, required the commission to consider papers "presented to it by or on behalf of the respective Governments in support of or in answer to any claims" (Art. VI, *infra*, p. 51), and declared that the decisions of the commission and of the Umpire were to be "final and binding upon the two Governments" (Art. VI, *infra*, pp. 51-52).

Since questions may arise between the two governments as to the validity and propriety of a claim even after payment has been received by the United States, the claim of American nationals remains that of the Government, and the funds retained or received by the United States in payment are the property of the United States until payment is made to the private claimants. *Williams v. Heard*, 140 U. S. 529, 537-538; *Great Western Ins. Co. v. United States*, *supra*; *Rustomjee v. The Queen*, L. R. 1 Q. B. 487 (1876), 2 Q. B. 69 (1876); Opinion of the Solicitor, *Distribution of Alsop Award*, *supra*, p. 15; Borchard,

supra, p. 383. Although the United States is under a "moral obligation" to make payment, "no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund." *Williams v. Heard*, *loc. cit. supra*; *Boynton v. Blaine*, *supra*, at 323.

The interest of private claimants is limited to "a possibility of their payment by Congress—an expectancy of interest in the fund, that is, a possibility coupled with an interest." *Williams v. Heard*, *loc. cit. supra*. This "possibility", it is true, is a property right as between private individuals, may be assigned, passes to the estate in bankruptcy, and the equitable owner may recover in the courts from a private person to whom the Government has made payment. *Comegys v. Vasse*, 1 Pet. 193; *Williams v. Heard*, *supra*. See also *Judson v. Corcoran*, 17 How. 611; *Frevall v. Bacle*, 14 Pet. 95; *Phelps v. McDonald*, 99 U. S. 298. These cases, however, do not aid petitioners. In such cases, as this Court pointed out in *Frelinghuysen v. Key*, *supra*, at 73, the fund had passed to private individuals in payment of the awards.

2. *Apart from statute, the Secretary of State may accept or reject the sabotage awards in his sole discretion until payment is ultimately made to the private claimants*

In presenting the claims of its nationals against Germany, the executive department enjoyed unlim-

ited discretion to settle, compromise, release, or abandon any or all of the claims.⁶ See Borchard, *supra*, pp. 366-380. The executive department was free to accept in full satisfaction any sum or diplomatic adjustment which it might deem reasonable (cf. *Great Western Ins. Co. v. United States*, 19 C. Cls. 206, 218, 112 U. S. 193, 197-198; *Howard's Case against Spain*, Moore's International Arbitrations, p. 2428), or release the claims of American nationals in exchange for a release of claims of a foreign government on behalf of its nationals against the United States (*McLeod's Case against the United States*, Moore's Arbitrations, p. 2419; cf. treaties cited in Borchard, *supra*, p. 374, Note 1), or aban-

⁶ Indeed, the very claims here in litigation were the subject of extended negotiations looking towards a settlement. "Protracted efforts commencing in 1924 to dispose of the so-called sabotage claims by way of settlement were made and several tentative offers of settlement involving the payment of very substantial sums were put forward by the then German Agent * * *." (Affidavit of Harold H. Martin, R. 82.) And shortly after the unanimous decision of the Commission on June 3, 1936, setting aside its 1932 order denying a rehearing, there was an adjournment and delay of over a year obtained at the request of the German Agent during which settlement negotiations were unsuccessfully conducted (R. 96, 141-142).

⁷ Whether the United States incurs a legal liability to its nationals as a result of releasing their claims in exchange for release of claims against the United States, has never been decided by this Court. The Court of Claims held the United States liable in *Gray, Adm'r v. United States*, 21 C. Cls. 340, 390-393 (French Spoliation cases); *Cushing, Adm'r, v. United States*, 22 C. Cls. 1, 31 (same). In *Blagge v. Balch*, 162 U. S. 439, however, this Court adverted to the fact that

don any claim which, in its judgment, should not be pressed. Cf. *Frelinghuysen v. Key*, *supra*; Report of Secretary of State Bayard on *Lazare and Pelletier claims against Hayti*, Sen. Ex. Doc. No. 64, 49th Cong., 2d Sess.; Sen. Ex. Doc. No. 52, 43d Cong., 1st Sess. (*Brig Caroline*, claim against Brazil); Moore's Arbitrations, 1361, 1396, *et seq.* (certain claims against Colombia).^{*}

Such is the conclusion indicated by precedent and practice. Such, we submit, is the conclusion required on principle. Since a claim against a foreign sovereign must be settled by diplomacy, the presentation of the claim involves the conduct of our foreign relations, entrusted by the Constitution, to the political departments, and the action of these departments in the conduct of foreign affairs is not subject to judicial review. Cf. *Boyn-ton v. Blaine*, *supra*, at 323-325; *Oetjen v. Central*

Congress had disagreed with the Court of Claims and had not permitted the proceedings to go to judgment (*id.* at 459) and held that payments appropriated for the benefit of American claimants whose claims had been released were made "as of grace and not of right" (457). No such question could arise with respect to petitioners' claims, since they have never been released by the Government, and the Government incurs no liability by reason of inability to enforce them.

^{*} Attorney General Hoar ruled (13 Op. Atty. Gen. 19) with respect to one of these claims that the United States could not resubmit a claim of an American national to a new commission after an award by the old. This opinion is in conflict with all other authorities and is undoubtedly erroneous. See Borchard, *supra*, p. 382, Note 2. Compare *Frelinghuysen v. Key*, *supra*, at 73.

Leather Co., 246 U. S. 297, 302; *Terlinden v. Ames*, 184 U. S. 270, 288; *Jones v. United States*, 137 U. S. 202, 212; *Doe v. Braden*, 16 How. 635; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420; *Foster v. Neilson*, 2 Pet. 253, 313, 314; *Charlton v. Kelly*, 229 U. S. 447, 469-476; *Compania Espanola v. Navemar*, 303 U. S. 68, 74; *Guaranty Trust Co. v. United States*, 304 U. S. 126, 137-139. The principle is founded on the obvious consideration that the exercise of an "antagonistic jurisdiction" by the courts would embarrass the Government and undermine its position in the conduct of its foreign relations. *United States v. Lee*, 106 U. S. 196, 209. It is true, as petitioners assert, that an exception has been made where private rights are involved. It is unnecessary to inquire to what extent the conclusion is assumed in the premise of the exception. For, as previously observed, the courts have recognized that claims against foreign sovereigns can best be settled by diplomacy and have accordingly held that claims espoused by the United States are claims of the Government and the funds received from a foreign government in payment are the property of the United States until paid to the claimant. In short, in the language of the exception, no private rights are involved until payment to the claimant.

The executive department may therefore accept or reject any award of the Commission unless its

authority is restricted by statute, and this power may be exercised even after payment has been made to the United States. The power to reject in these circumstances is settled by the decisions of this Court in *Frelinghuysen v. Key*, *supra*, and *Boynton v. Blaine*, *supra*. In these cases reconsideration of the propriety of the Weil and La Abra awards against Mexico under the Convention of July 4, 1868, had been specifically authorized by the Act of June 18, 1878, 20 Stat. 144. But the decisions were expressly rested on the broad ground that the rejection of an award is a matter committed to the determination of the executive department, and that Congressional authorization was unnecessary. *Frelinghuysen v. Key*, *supra*, at 74; *Boynton v. Blaine*, *supra*, at 322-323. The congressional authorization to reconsider, the Court concluded, amounted only to a "request", and the executive department's power to withhold payment after an award and receipt of funds from the foreign government was the same "without this request as with it". *Frelinghuysen v. Key*, *supra*, at 74. Moreover, the State Department has in other instances exercised its power to reject awards without statutory authority. See *Brig Caroline* and *Pelletier* cases, *supra*.

The decision of the executive department to accept an award is equally conclusive. See *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 460; *cf. Hubbel et al. v. United States*, 15 C. Cls. 546 (The Caldera Cases), affirmed by an equally divided

court; 16 C. Cls. 635 (not reported in official United States Reports).⁹ Since a private claimant has no legal or equitable right to payment, he cannot object to the depletion of the fund available for the payment of his claim. And the questions involved are political in character whether the executive department rejects or accepts an award. To overturn a rejection in a judicial proceeding is to precipitate a controversy with a foreign government which the courts are powerless to settle. To overturn an acceptance is not necessarily fraught with such danger, but "Obviously, it would not do for the courts to declare that an act is a breach of a treaty and results in this or that remedy. The remedy accorded might not content the foreign power or might bring about a conflict between the executive and judicial branches of our own government." *George E. Warren Corp. v. United States*, 94 F. (2d) 597, 599 (C. C. A. 2d), certiorari denied, 304 U. S. 572. The fundamental objection to the exercise of an "an-

⁹In the *Caldera* cases, the Court of Claims held, under a jurisdictional act authorizing the court to hear and determine certain claims to payment out of the Chinese Indemnity fund "according to the principles of justice and international law," that the espousal by the Government of the petitioner's claim must be accepted by the courts as conclusive of its validity. The court did not suggest, of course, that the executive department could not change its position at any time (*cf.* Borchard, *supra*, p. 383), but found that the Government had consistently supported the petitioner's claim at all times.

tagonistic jurisdiction" in the case of an acceptance, however, is that it would subject the executive department to a grave restriction in its authority to settle and compromise claims (see *supra*, pp. 23-24) from which all other governments are free. "In its international relations", this Court has held, "the United States is as competent as other nations to enter into such negotiations, and to become a party to such conventions, without any disadvantage due to limitation of its sovereign power, unless that limitation is necessarily found to be imposed by its own Constitution." *Burnet v. Brooks*, 288 U. S. 378, 400.

Nor does the power of the executive department to accept or reject an award depend in any way upon the nature of the objection made to the award. The reason for suspending payment of the La Abra Silver Mining Company claim was the suggestion advanced by Mexico that the claim was tainted with fraud. But the executive department is at liberty to accept or reject an award whatever the basis of objection may be. The private claimant has no legal or equitable right to receive payment or to prevent depletion of the fund available for payment, whatever may be the alleged merits of the claim or the jurisdiction of the commission. And the danger that judicial review may embarrass the Government and undermine its position in the conduct of foreign affairs is likewise the same whatever the character of the claims or the nature

of the proceedings of the commission or its members in rendering the award. The executive department must be permitted to abandon or assert a claim whenever, in its judgment, the public interest and international relations require. See Borchard, *supra*, p. 373.

The State Department has uniformly acted upon this basis. From the time of the Jay treaty of 1794 to the present date, controversies between the United States and a foreign power as to the jurisdiction of a commission or umpire appointed to arbitrate disputes between the two nations have been settled by negotiations between the diplomatic representatives of the respective governments. The claim of the British commissioners of authority to withdraw from the commission established by the Jay treaty and thus to prevent the commission from functioning was settled in this manner. Moore's Arbitrations, pp. 321-324; Moore's Digest VII, p. 33. In the case of the decision of the King of the Netherlands, appointed by a convention of September 29, 1827, to arbitrate a boundary dispute between the United States and Great Britain, the United States protested on jurisdictional grounds, but President Jackson was inclined to accept the award and apparently submitted the issue to the Senate (which rejected the decision) only because of the objections of the States of Maine and Massachusetts (Moore's Digest VII, pp. 59-60). In Pelletier's

case against Haiti the Secretary of State concluded that the arbitrator had too narrowly construed his jurisdiction in refusing to consider certain objections to the claim, and refused the award. Sen. Ex. Doc. No. 64, 49th Cong. 2d Sess. In the case of claims on behalf of certain nationals against Colombia, the Secretary of State agreed to resubmit the claims to a new commission after objection had been made to the original awards by Colombia on jurisdictional grounds. Moore's Arbitrations, pp. 1361 and particularly 1396 *et seq.* In the Orinoco Steamship Co. case against Venezuela, the protest to the United States that the umpire had exceeded his jurisdiction was submitted for arbitration to the Permanent Court of Arbitration for The Hague. See Wilson, *Hague Arbitration Cases* (1915), pp. 206-214; 5 Am. J. Int. L. 230. The United States protested on jurisdictional grounds that the decision with respect to a boundary dispute between the United States and Mexico, involving the Chamizal tract, the United States offered to settle the dispute by further negotiations, but nothing came of this suggestion due to internal trouble in Mexico. *Foreign Relations*, 1911, pp. 598-605. In some cases the United States has insisted that the question of the commission's jurisdiction is for the commission to decide (Moore's Digest VII, pp. 31-35; Moore's Arbitrations, pp. 1241, 2599-2600); in

others, as appears from the foregoing discussion, this Government has protested on jurisdictional grounds and suggested reconsideration; and in others, it has agreed to reconsider an award because of jurisdictional objections advanced by the other government. Whatever the merits of the Government's position in any of these cases, however, it seems obvious, as the petitioner in No. 382 appears to recognize (Br. 27), that such questions must be settled by diplomacy.

The decision of this Court in *Comegys v. Vasse*, 1 Pet. 193, does not aid petitioners. In that case the Court held that the decision of the domestic commission, established to pass upon private claims against Spain which the United States by treaty had agreed to assume, was conclusive on the question of the validity of the claim, but that the commission, having been given no power to subpoena witnesses, was not intended to pass upon the question of the ownership of the claim as between private individuals. In the course of its opinion, this Court observed that it was "wholly immaterial" to the domestic commission who was the original claimant and who the equitable owner in order to determine the liability of Spain, and construed the treaty to limit the jurisdiction of the commission to the determination of the validity of the claims against Spain and to withhold authority to pass on the issue of the ownership of the claim as between private individuals.

In the *Comegys* case, however, all differences between Spain and the United States had been settled by the treaty, and the power of the domestic commission was limited to that expressly conferred by the treaty (8 Stat. 252, 260) and the implementing act (3 Stat. 637, 639). The executive department, on the contrary, has such power in the conduct of foreign relations as has not been withdrawn by statute. Moreover, the function of the domestic commission was to distribute funds appropriated by Congress after all political issues between the United States and Spain had been settled by treaty and provision was made for payment without any action of the Secretary of State (8 Stat. 252, 260).¹⁰

¹⁰ The Congress has in some cases established a domestic commission to pass upon claims to be paid out of a fixed lump sum paid or agreed to be paid by a foreign government in satisfaction of all claims, and has directed the Secretary of State to certify a "list" of the claims approved by the commission to the Secretary of the Treasury for payment. See, e. g., Act of June 23, 1874, 18 Stat. 245, 248 (Alabama claims); Act of April 10, 1935, 49 Stat. 149 (Mexican claims). In such cases, the commission's determination of the validity of the claims may involve political questions since the United States may return any excess not found to be due on account of claims of American nationals. See Borchard, *supra*, p. 375, n. 4. Whether such statutes restrict the power which the Secretary of State would otherwise enjoy is considered below in connection with the discussion of the Settlement of War Claims Act. See *infra*, p. 33, *et seq.*

B. THE AUTHORITY OF THE SECRETARY OF STATE TO ACCEPT OR REJECT THE SABOTAGE AWARDS IN HIS SOLE DISCRETION IS RECOGNIZED AND CONFIRMED IN THE SETTLEMENT OF WAR CLAIMS ACT

The petitioners contend that they have a property right in the Special Deposit funds by virtue of the provisions of the Settlement of War Claims Act, and that the courts may construe the provisions of the Agreement of August 10, 1922, in order to protect and enforce their private rights (Br. of Petitioners in No. 381, pp. 20-29).

The answer is that, under the Act, the Secretary of State may accept or reject an award in his sole discretion and, whatever the right of petitioners to compel payment of awards in which they are interested, the limit of the Secretary of the Treasury's duty is to pay the awards certified as such by the Secretary of State.

Paragraphs (a) and (b) of Section 2, invoked by petitioners, are very similar in terms and were undoubtedly modeled after the Act of February 26, 1896, c. 34, 29 Stat. 28, 32. That Act provides:

Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury.

The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the cer-

tificates of the Secretary of State, pay the amounts so found to be due.

Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for.

The 1896 enactment was passed at the suggestion of the Secretary of State and its sole purpose and effect was to make provision for the deposit of funds received from foreign governments in payment of claims of American nationals. See 28 Cong. Rec. 1058, 54th Cong., 1st Sess. Prior thereto, where payment was withheld for some reason, and where the funds had been deposited by the Secretary in private banks, the increment of interest earned had been the subject of litigation. See *Angarica v. Bayard*, 127 U. S. 251. The statute was plainly not intended to modify the pre-existing authority of the Secretary of State to make conclusive determination of any question affecting the liability of foreign governments to the United States. See Borchard; *supra*, pp. 388-392.

The provisions of Sections 2 (a) and 2 (b) of the Settlement of War Claims Act are equally limited in purpose and effect. It cannot seriously be suggested that Congress intended to overturn the settled practice in the disposition of claims of American nationals against foreign sovereigns. The contention of petitioners that the Congress intended to reduce the Secretary to the status of an

automaton with duties limited to the ministerial function of certifying the authenticity of an award is plainly specious. The argument, if sound, would require the Secretary to accept any award made by the Commission in the exercise of its "proper" jurisdiction, even though subsequent investigation should prove that the claim was without merit, and that, in the interest of justice and the maintenance of good relations with a foreign government, the United States should reject the award. To be sure, the statute speaks of an "award" of the "Commission," and the text permits of a distinction between an award based on an inequitable claim but rendered by the "properly constituted" commission acting within its "proper" jurisdiction and one rendered by persons without authority under the Agreement to function as the commission or based on a claim beyond the scope of the commission's authority under the treaty. But the statute must be read against the background of practice and history, and when so construed, the distinction, as we have shown, is without a legal difference.¹¹

¹¹ The petitioners argue from other statutes directing the Secretary of State to certify a "list" of claims approved by a *domestic* commission established to distribute a fixed lump sum paid or promised to be paid to the United States that the Secretary's duty was intended to be purely ministerial in such cases (Brief of Petitioner in No. 381, pp. 41-42) and hence was intended to be the same in this statute. It is by no means clear in such cases, despite the language of the statutes re-

The Government's position is fully sustained by the decisions of this Court. In *Frelinghuysen v. Key*, 110 U. S. 63, this Court held that a statute directing the Secretary of State to distribute the funds received in payment of awards against Mexico did not restrict the power otherwise possessed by the executive department to withhold payment pending consideration of a suggestion from Mexico that the claim was tainted with fraud. The statute in question provided (Act of June 18, 1878, c. 262, 20 Stat. 144, Sec. 1):

That the Secretary of State be, and he is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims, * * * and whenever, and as often as, any installments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among

ferred to, that Congress intended so to restrict the Secretary's power, since the foreign state may still have an interest in the return of any possible excess, which may suggest that Congress intended to leave to the Secretary discretion to negotiate with the foreign Government with respect to any of the claims. Whatever may be the conclusion as to the statutes dealing with such domestic commissions, however, it is obvious that in this case the liability of Germany was not settled by the Agreement of August 10, 1922, and Congress could not have intended to withdraw from the Secretary of State power to dispose of such political questions at least until after certification.

the corporations, companies, or private individuals respectively in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. * * *

An action was brought by the assignee of an award-holder for mandamus to compel the Secretary of State to pay the award, which was being withheld to investigate charges of fraud. The Court declined to compel payment and observed (110 U. S., at 73-74).

The first section of the act of 1878 authorizes and requires the Secretary of State to receive the moneys paid by Mexico under the convention, and to distribute them among the several claimants, but it manifests no disposition on the part of Congress to encroach on the power of the President and Senate to conclude another treaty with Mexico in respect to any or even all the claims allowed by the commission, if in their opinion the honor of the United States should demand it. At most, it only provides for receiving and distributing the sums paid without a protest or reservation, such as, in the opinion of the President, is entitled to further consideration. It does not under-

take to set any new limits on the powers of the Executive.

The Act of June 18, 1878, it is true, contained a specific request to the President (Sec. 5) to withhold the award on which suit was being brought. But the Court expressly noted that the President could have instituted the same inquiry prior to payment "without this request as with it" (Id. at 74). These views were reaffirmed in *Boynton v. Blaine*, 139 U. S. 306, 322-323, a subsequent proceeding to compel payment after the Senate had rejected a treaty providing for the resubmission of the claim. See also *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 458-460; *Alling v. United States*, 114 U. S. 562, 564; Cf. Borchard, *supra*, pp. 389-390; Opinion of the Solicitor, *Distribution of Alsop Award*, *supra*, pp. 42-43. The objection to the *La Abra* award, it is true, went to its merits, but the distinction between such questions and "jurisdictional" issues is without a legal difference, as we have shown. The Act makes no provision for the settlement of differences between the two Governments with respect to the "jurisdiction" of the Commission and Congress undoubtedly intended to leave with the executive department the power which it had theretofore enjoyed to settle such controversies by diplomacy.

The petitioners appear to suggest that, in certifying the sabotage awards, the Secretary of State did not purport to pass upon the question whether

the Umpire and the American Commissioner were authorized by the Agreement to function as the Commission and, if so, whether the Commission had "jurisdiction" to enter the awards. It may be assumed for purposes of argument that the Secretary did not undertake to make an independent determination of these questions. It is perfectly clear, however, that, in response to the protests of the German diplomatic representatives beginning in 1933, the Secretary construed the treaty to authorize the Commission and the Umpire to determine such questions. And since it cannot be doubted that the two Governments had power to submit such questions to the Commission and the Umpire, the decision of the Secretary with respect to these issues stands upon the same footing as a determination that a particular claim is within the jurisdiction of the Commission.

It may be admitted that the Secretary of the Treasury, in some circumstances, may be compelled by judicial process to pay the amount of a certified award to the claimant named therein or to the person who has been adjudged, as against the named claimant, to be the equitable owner of the award.¹² *Mellon v. Orinoco Iron Co.*, 266 U. S.

¹² See, however, Section 2 (g) of the Act, which provides that "Payment shall be made only to the person on behalf of whom the award was made," except in specified instances. Cf. *Blagge v. Balch*, 162 U. S. 439. See also Sec. 4 (5).

121, cited by petitioners, so holds. But, irrespective of the duty of the Secretary of the Treasury, in such circumstances, the case obviously does not aid the petitioners in their present endeavor to overthrow the certification issued by the Secretary of State. Unlike the situation in instant cases, the validity of the award in the *Orinoco* case was not in question. The sole issue in that case was the ownership as between private litigants of a specified fund received by the United States from Venezuela under an award certified by the State Department. The Secretary of State had made no attempt to adjudge the respective rights of the competing claimants. He simply declared that, "in accordance with the uniform rule and practice of the Department" any new claimants who seek to enforce rights alleged to be derived from the award-holders (by the way of assignment or otherwise) are "remitted to the courts for the enforcement of the rights of which they consider themselves possessed * * *" (266 U. S. at 124). The Secretary thus expressly recognized the distinction, drawn in *Comegys v. Vasse, supra*, between the validity of the award, a political question, and the ownership of the claim as between private individuals, a nonpolitical question appropriate for judicial determination. Thus, the action challenged neither a decision as to the basic ownership of the claim nor the certification of the award itself, and the Court was not asked to overturn a determination of the Secretary of State. Rather, an

assumption that the award as certified was valid, and hence susceptible of payment, was the foundation of the cause of action.¹³ The cases at bar, on the contrary, are prosecuted neither by persons named in the sabotage awards nor by persons who assert an equitable right, as against the named claimants, to the payment of the awards as certified. Instead, the foundation of petitioners' case is the alleged invalidity of the awards as certified. This raises an issue, not involved in the *Orinoco* case, upon which the decision of the Executive branch is conclusive.

The case of *Perkins v. Elg*, 307 U. S. 325, does not aid petitioners. In that case this Court held that the Secretary of State could be joined in that part of the decree which granted a declaratory judgment that plaintiff was a citizen, although the Secretary could not be compelled by mandamus to grant the plaintiff a passport. The issue of citizenship, however, has not and probably cannot be committed to the exclusive determination of the

¹³ The decision in the *Orinoco* case was based upon the Court's prior ruling in *Houston v. Ormes*, 252 U. S. 469, 473, that where Congress has appropriated a fund for payment to a specified claimant, one who has an equitable interest in the fund as against the person so named may enjoin the Secretary of the Treasury from making payment to such person. See 266 U. S. at 125-6. And the decision in the *Houston* case, in turn, proceeds on the view that, since the Secretary was under a ministerial duty to pay the person named by Congress which could be enforced by mandate, the suit against the Secretary was a "convenient" method of settling a controversy between the private persons. 252 U. S. at 473.

Secretary of State. Cf. *Ng Fung Ho v. White*, 259 U. S. 276; *Crowell v. Benson*, 285 U. S. 22, 60; See dissenting opinion of Mr. Justice Brandeis in same case, p. 90.

II

IRRESPECTIVE OF THE POLITICAL NATURE OF THE INQUIRY, CERTIFICATION OF THE SABOTAGE AWARDS BY THE SECRETARY OF STATE IS CONCLUSIVE, AND NOT SUBJECT TO JUDICIAL REVIEW

Under Point I the Government has contended that the question of the validity of the sabotage awards is a political question, that the executive department has power to settle such questions apart from statute, and that the Settlement of War Claims Act was not intended to restrict the power enjoyed by the Secretary of State in the absence of a statute. The Government now contends in Point II that, even assuming the executive department has no such power apart from statute, the Settlement of War Claims Act was intended to confer it.

Admittedly the funds in the German Special Deposit Account are the property of the United States. *Cummings v. Deutsche Bank*, 300 U. S. 115, 120-124. That the Congress has constitutional power to give finality to the determinations of the Secretary of State with respect to the amount and validity of any award cannot be doubted, Cf. *United States v. Babcock*, 250 U. S. 328; *Work v. Rives*, 267 U. S. 175. And such, we submit, was

the purpose and effect of the Settlement of War Claims Act.

The object of the statute was to discharge a "moral obligation," not to pay a legal debt (See Sen. Rept. 273, 70th Cong., 1st Sess., 69 Cong. Rec. 751, *et seq.*). Nowhere in the Act is there any provision expressly creating a private right in an American national. *Dismuke v. United States*, 297 U. S. 167, 169. And while the statute does not expressly foreclose judicial review,¹⁴ the provisions of Sections 2 (a) and 2 (b), authorizing the Secretary of the Treasury to pay such awards as are certified by the Secretary of State, evidences the intention of Congress to give finality to the latter's determination. Cf. *Great Northern Ry. Co. v. United States*, 277 U. S. 172; *Butte, Anaconda & Pacific Ry. Co. v. United States*, 290 U. S. 127.

In the *Great Northern Ry. Co.* case, *supra*, Congress had by Section 209 (c) of the Transportation Act, guaranteed a certain income to railway companies for a period of six months after the termination of federal control. Section 209 (g) provided that "the Commission [Interstate Commerce Commission] shall * * * ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing

¹⁴ Cf. Section 8, which declares that decisions by the Secretary of the Treasury in respect of payments from the funds are "final and conclusive, and * * * not * * * subject to review by any other officer of the United States * * *".

guarantee * * *." Certification by the Commission was held to be conclusive. This Court said (pp. 182-183):

The mere fact that the certificate may be conclusive, if it be a fact, would not entitle the Company to a judicial review. Compare *United States v. Babcock*, 250 U. S. 328, 331; *Work v. Rives*, 267 U. S. 175. We find no reason for thinking that because Congress confided to the Commission the task of certifying the amount to be paid to carriers from the public treasury, as an incident to the World War, it thereby consented that the United States should be sued in the special proceeding in equity devised long before to control the Commission's execution of its regulatory functions in enforcing the Interstate Commerce Act.

In *Butte, Anaconda & Pacific Ry. Co. v. United States, supra*, the Government, after payment to a carrier of a "deficit" during federal control, sought to recover the amount paid, because of the Commission's misconstruction of the term "deficit". Recovery was denied "because when Congress * * * imposed the duty to certify to the Treasury the amounts severally due to carriers, it required the Commission—and hence authorized it—to determine whether the claimant was entitled to relief". 290 U. S. at 136. And "since Congress has not provided a method of review, neither the Commission nor a court has power to correct the

alleged error after payment made pursuant to a certificate" (*ibid.*). See also *United States v. Atchison, Topeka & Santa Fe Ry. Co.* 249 U. S. 451; *Silberschein v. United States*, 266 U. S. 221.¹⁵

These cases amply support the position of the Government in the case at bar. When Congress imposed the duty on the Secretary of State to certify awards of the Commission, it thereby authorized him to determine whether or not the United States should accept or reject any award. Cf. *Butte, Anaconda & Pacific Ry. Co. v. United States*, *supra*, at 136.¹⁶ To hold otherwise would render Section 2 (a) of the Settlement of War Claims Act largely meaningless.

There is no substance in the suggestion (Brief of Petitioner in No. 381, pp. 37-38) that the Secretary of State has no function under the Act from

¹⁵ Similary, cases arising under the swamp-land grants have held the patents of the Secretary of Interior conclusive and final. *French v. Fyan*, 93 U. S. 169; *Heath v. Wallace*, 138 U. S. 573, 585; *Chandler v. Calumet & Hecla Mining Co.*, 149 U. S. 79, 92; *McCormick v. Hayes*, 159 U. S. 332.

¹⁶ *Dismuke v. United States*, 297 U. S. 167, is not opposed. The annuities involved in that case were held not to be gratuities, but were composed in part at least from contributions by employees. 297 U. S. at 170. Moreover, the statute in that case created a right in the employee to the disability fund. "The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States." 297 U. S. at 169.

which an inference of intention to commit the power of decision to him may be drawn. The Act was passed with reference to the Agreement of August 10, 1922, and, while the Agreement contemplated that the Commission should pass on all questions related to the claims presented, the Secretary of State necessarily was required to determine what claims should be submitted and whether, in the event of protest from Germany, any of the claims should be abandoned. The question, for example, whether the claims presented were within the jurisdiction of the Commission is one of the most common types of issues arising in connection with international arbitrations, and is a familiar subject of negotiation between the diplomatic representatives of the respective governments. If, notwithstanding the practice and precedents of almost a hundred and fifty years, it be assumed that the executive department has no power apart from statute to settle such questions by diplomacy, then the Settlement of War Claims Act should be construed to confer the necessary authority. These continually recurring questions must have been intended to be settled without recourse to the courts in the first instance, and since no provision was made for judicial review after an administrative determination of the executive department, it seems clear that Congress intended none. The petitioners' contention that any action of the Secretary of State would not be taken under the statute (Petitioner's Brief in No. 381, pp. 38-

39) thus either ignores the power of the Secretary apart from statute, as we argue under Point I, or misconceives the scope and effect of the Act. It may be, of course, that Congress intended the Commission or Umpire to make final disposition of every conceivable question, leaving nothing to be settled between the two Governments; but, if so, it is obvious that the Act precludes the petitioners from seeking judicial review of the issues here sought to be raised.

Nor is it material that no provision was made in the Act for hearing private individuals prior to certification by the Secretary. The Agreement, in accordance with established usage, provided that all claims should be presented through agents of the "two Governments," although it did not expressly forbid the Commission to hear argument by private counsel. The Government is, of course, under no obligation whatever to consult private claimants in connection with the presentation of claims on behalf of private individuals. See Borchard, *supra*, p. 371. If anything, the absence of provision for hearing private claimants brings into sharper focus the lack of standing of these petitioners to maintain the present proceedings.

We do not deny that the question of the ownership of claims as between private individuals may be determined in judicial proceedings. The Secretary of State has never sought to make final disposition of such questions, and, even if he should seek to do so, the equitable owner would not be precluded from asserting his rights in appropriate

judicial proceedings. The equitable owner may compel payment to himself even where Congress has appropriated a fund for payment to a beneficiary specifically named in the statute. *Houston v. Ormes*, 252 U. S. 469. But even in attachment proceedings, the validity of the claim attached must be assumed, and this question the present statute committed to the determination of the Secretary of State.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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DECEMBER 1940,

APPENDIX

The Agreement of August 10, 1922, between the United States and Germany, 42 Stat. 2200, provided:

The United States of America
and
Germany,

being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany,
and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Wirth, Chancellor of the German Empire,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The commission shall pass upon the following categories of claims which are more

particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They

may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties: The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V

Each Government shall pay its own expenses, including compensation of its own commissioner, agent, or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above-named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August 1922.

[SEAL]
[SEAL]

ALANSON B. HOUGHTON.
WIRTH.

Section 4 of the Settlement of War Claims Act of 1928, c. 167, 45 Stat. 254, 260, reads as follows:

SEC. 4. (a) There is hereby created in the Treasury a German special deposit account, into which shall be deposited all funds hereinafter specified and from which shall be disbursed all payments authorized by section 2 or 3, including the expenses of administration authorized under subsections (c) and (m) of section 3 and subsection (e) of this section.

(b) The Secretary of the Treasury is authorized and directed to deposit in such special deposit account—

(1) All sums invested or transferred by the Alien Property Custodian, under the provisions of section 25 of the Trading with the Enemy Act, as amended;

(2) The amounts appropriated under the authority of section 3 (relating to claims of German nationals); and

(3) All money (including the proceeds of any property, rights, or benefits which may be sold or otherwise disposed of, upon such terms as he may prescribe) received, whether before or after the enactment of this Act, by the United States in respect of claims of the United States against Germany on account of the awards of the Mixed Claims Commission.

(c) The Secretary of the Treasury is authorized and directed, out of the funds in such special deposit account, subject to the provisions of subsection (d), and in the following order of priority—

(1) To make the payments of expenses of administration authorized by subsections (c) and (m) of section 3 or subsection (e) of this section;

(2) To make so much of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), as is attributable to an award on account of death or personal injury, together with interest thereon as provided in subsection (c) of section 2;

(3) To make each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount thereof is not payable under paragraph (2) of this subsection and does not exceed \$100,000, and to pay interest thereon as provided in subsection (c) of section 2;

(4) To pay the amount of \$100,000 in respect of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of \$100,000 and is not payable in full under paragraph (2) of this subsection. No

person shall be paid under this paragraph and paragraph (3) an amount in excess of \$100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid. Pending the completion of the work of the Mixed Claims Commission, the Secretary of the Treasury is authorized to pay such installments of the payments authorized by this paragraph as he determines to be consistent with prompt payment under this paragraph to all persons on behalf of whom claims have been presented to the Commission;

(6) To pay amounts determined by the Secretary of the Treasury to be payable in respect of the tentative awards of the Arbitrator, in accordance with the provisions of subsection(s) of section 3 (relating to awards for ships, patents, and radio stations);

(7) To pay to German nationals such amounts as will make the aggregate payments equal to 50 per centum of the amounts awarded under section 3 (on account of ships, patents, and radio stations). Pay-

ments authorized by this paragraph or paragraph (6) may, to the extent of funds available under the provisions of subsection (d) of this section, be made whether or not the payments under paragraphs (1) to (5), inclusive, of this subsection have been completed;

(8) To pay accrued interest upon the participating certificates evidencing the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld);

(9) To pay the accrued interest payable under subsection (c) of section 2 (in respect of awards of the Mixed Claims Commission) and subsection (h) of section 3 (in respect of awards to German nationals);

(10) To make such payments as are necessary (A) to repay the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld), (B) to pay amounts equal to the difference between the aggregate payments (in respect of claims of German nationals) authorized by subsections (g) and (h) of section 3 and the amounts previously paid in respect thereof, and (C) to pay amounts equal to the difference between the aggregate payments (in respect of awards of the Mixed Claims Commission) authorized by subsections (b) and (c) of section 2, and the amounts previously paid in respect thereof. If funds available are not sufficient to make the total payments authorized by this paragraph, the amount

of payments made from time to time shall be apportioned among the payments authorized under clauses (A), (B), and (C) according to the aggregate amount remaining unpaid under each clause;

(11) To make such payments as are necessary to repay the amounts invested by the Alien Property Custodian under subsection (b) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of the unallocated interest fund); but the amount payable under this paragraph shall not exceed the aggregate amount allocated to the trusts described in subsection (c) of section 26 of such Act;

(12) To pay into the Treasury as miscellaneous receipts the amount of the awards of the Mixed Claims Commission to the United States on its own behalf on account of claims of the United States against Germany; and

(13) To pay into the Treasury as miscellaneous receipts any funds remaining in the German special deposit account after the payments authorized by paragraphs (1) to (12) have been completed.

(d) 50 per centum of the amounts appropriated under the authority of section 3 (relating to claims of German nationals) shall be available for payments under paragraphs (6) and (7) of subsection (c) of this section (relating to such claims) and shall be available only for such payments until such time as the payments authorized by such paragraphs have been completed.

(e) The Secretary of the Treasury is authorized to pay, from funds in the German special deposit account, such amounts, not in excess of \$25,000 per annum, as may be necessary for the payment of the ex-

penses in carrying out the provisions of this section and section 25 of the Trading with the Enemy Act, as amended (relating to the investment of funds by the Alien Property Custodian); including personal services at the seat of government.

(f) The Secretary of the Treasury is authorized to invest and reinvest, from time to time, in bonds, notes, or certificates of indebtedness of the United States any of the funds in the German special deposit account, and to deposit to the credit of such account the interest or other earnings thereon.

(g) There shall be deducted from the amounts first payable under this section to any American national in respect of any debt the amount, if any, paid by the Alien Property Custodian in respect of such debt which was not credited by the Mixed Claims Commission in making its award.

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Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 381 and 382

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP CORPORATION, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents

INTERVENER-RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI

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v.

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Respondents.

INTERVENER-RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI

Opinions Below

The opinion below of the United States Court of Appeals for the District of Columbia (R. 335) has not yet been reported. That court unanimously affirmed an order of the District Court (R. 298) granting the motion of defendants Hull and Morgenthau (here respondents) to dismiss the complaint and the plaintiff-intervener's bill of intervention, and also granting the motion of the intervener-defendant Lehigh Valley Railroad Company (here also a respondent) for summary judgment dismissing the complaint and the plaintiff-intervener's bill of intervention.* The opinion of the District Court (R. 295) is reported in 31 F. Supp. 371.

* This brief is filed in opposition to the petitions in both No. 381 and No. 382. Both petitions seek a review of the same decision. Since the complaint and the plaintiff-intervener's bill of intervention sought identical relief, they are herein sometimes referred to as "the complaint".

Statement of the Case

On October 30, 1939, the Mixed Claims Commission, United States and Germany, granted awards to the United States on account of losses suffered by various corporations and individuals by explosions and fires caused by German sabotage at the Black Tom terminal in New York Harbor in July, 1916, and at the Kingsland, N. J., assembly plant in January, 1917 (R. 63, 107-08). The awards were filed with the Secretary of State, who certified them to the Secretary of the Treasury for payment to the claimants, pursuant to Section 2 of the Settlement of War Claims Act of 1928 (45 Stat. 254) as amended (R. 110-11).*

* The pertinent provisions of Section 2 of the Settlement of War Claims Act of 1928 are as follows:

"Sec. 2 (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the 'Mixed Claims Commission').

"(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.

"(c) The Secretary of the Treasury is authorized and directed to pay annually (as nearly as may be) simple interest, at the rate of 5 per centum per annum, upon the amounts payable under subsection (b) and remaining unpaid, beginning January 1, 1928, until paid.

"(d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4."

This action was brought by petitioner, Z. & F. Assets Realization Corporation for a declaratory judgment that the awards of the Commission were invalid and to enjoin the Secretary of the Treasury from paying the awards. The complaint also sought (too late) to enjoin the Secretary of State from certifying the awards. Petitioner American-Hawaiian Steamship Company intervened as a co-plaintiff.

Lehigh Valley Railroad Company, one of the beneficiaries of the Mixed Claims Commission's awards to the United States of October 30, 1939 (hereinafter sometimes called the "sabotage awards"), intervened on its own account and on behalf of the 152 other sabotage awardholders.

Petitioners hold awards previously made by the Mixed Claims Commission, on which payments in excess of the principal but insufficient to cover both principal and interest, have long since been received (R. 111). Not enough money is left in the German Special Deposit Account provided for in the Settlement of War Claims Act of 1928 to pay interest in full on all awards, unless Germany resumes payments on its bonds held by the United States to secure payment of all awards.* Petitioners claim that any payments on the sabotage awards would deplete the Account to their injury (R. 8).

Both the Secretary of State and the Secretary of the Treasury moved to dismiss on the ground that the court had no power to inquire into the validity of awards made by an international tribunal set up by two sovereign Governments dealing with controversies between the two Governments (R. 294).

* Congress did not contemplate that payment in full of the awards would be made prior to 1953 (see Report of Senate Finance Committee, No. 273, 70th Cong., on Settlement of War Claims Bill, p. 5).

Lehigh Valley Railroad, after filing its answer (R. 33), moved for summary judgment dismissing the complaint on the grounds raised by the original defendants and *also* on the ground that, on the uncontested facts before the court, the awards were valid (R. 76).

Questions Presented

The issues presented, as variously described in the petitions, are properly divisible into two categories:

1. As both courts below held, the complaint presented a "political" (diplomatic) question properly for the State Department, which had acted,—a question not justiciable in the courts in that its determination would involve interference in the domain of foreign affairs by a direct determination of rights, liabilities and status of the United States and Germany under the Executive Agreement dated August 10, 1922 between the two countries (42 Stat. 2200), entered into pursuant to the Treaty of Berlin dated August 25, 1921 (42 Stat. 1939).

2. The questions which the courts below held to be not justiciable and, therefore, did not decide, although they were argued extensively before both courts, concerned the validity of the sabotage awards of the Mixed Claims Commission, United States and Germany, established pursuant to said Executive Agreement between the two countries. Petitioners' attacks on the awards of that Commission were based on three grounds, all of which Germany had previously urged in diplomatic exchanges with the Secretary of State and before the Mixed Claims Commis-

sion itself. Both the Secretary of State and the Commission rejected those contentions. They were:

(a) that the Mixed Claims Commission could not set aside its earlier decision of 1930 on these claims, adverse to the United States, even though the earlier decision had been induced by fraud and suppression of evidence on the part of Germany;

(b) that the wilful withdrawal of the German member of the Mixed Claims Commission, after the submission of evidence and briefs and oral argument and during the deliberations of the Commission on the claims, had made the Commission powerless to render a decision on the claims before it; and

(c) that the Canadian ownership of the stock of one of the awardholders, a New York corporation, made the award to the United States on behalf of that corporation invalid.

Treaties and Statutes Involved

The Knox-Porter Resolution (42 Stat. 105, 106), approved July 2, 1921, provided that all property of the German Government, and of its nationals, which, on or after April 6, 1917, had come into the possession or under control of the United States, should be retained by the United States

"until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents * * *

since July 31, 1914, loss, damage, or injury to their persons or property * * * (R. 79).

That Resolution was incorporated in the Treaty of Berlin of August 25, 1921 (42 Stat. 1939). Subsequently, an Executive Agreement between the United States and Germany was signed at Berlin on August 10, 1922 (42 Stat. 2200) providing for the creation of a Mixed Claims Commission to determine the amount to be paid by Germany to the United States in satisfaction of Germany's financial obligations under the Treaty to the United States on behalf of her nationals and on her own behalf (R. 15-18). The Commission was to consist of three members, one commissioner to be appointed by each Government and an umpire to be selected by agreement of the two Governments (Art. II). It was provided that the Umpire should

"decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings" (Art. II)

and that

"The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments" (Art. VI).

The parties before the Commission were the two Governments, United States and Germany (R. 18, 81-2). All claims presented to the Commission were made by the United States on its own behalf or on behalf of its nationals, and the conduct and control of the prosecution of such claims rested solely with the United States (id.).

The Settlement of War Claims Act of 1928 (45 Stat. 254)

(a) created in the United States Treasury a German Special Deposit Account, composed in part, of all sums invested or transferred by the Alien Property Custodian under the Trading with the Enemy Act, and of all money received by the United States in respect of claims against Germany on account of the awards of the Mixed Claims Commission; and

(b) provided for certification of awards of the Mixed Claims Commission by the Secretary of State and directed the Secretary of the Treasury to make payment on awards so certified.*

Germany agreed to replenish the Special Deposit Account by payments on bonds which it deposited in the Treasury of the United States in a total principal amount of about \$505,000,000 (at par of exchange) with maturities spaced over a period of 52 years (Debt Funding Agreement of June 23, 1930, 46 Stat. 500, Report of Secretary of Treasury 1930, pp. 341, 347, 354, 357). Germany has been in default on maturities of these bonds for a period of over five years (R. 43-4).

The Facts

The facts are set forth in detail in the affidavit of Harold H. Martin, the representative of the United States Government before the Commission (R. 77-112). Petitioners' statements of them make it necessary to outline briefly the background of the case.

* The relevant language of the Statute with respect to certification and payment is quoted *supra*, p. 2.

The Proceedings Before the Commission From 1930 to 1939

In a decision rendered on October 16, 1930, the Commission found that, although Germany had authorized sabotage in this country, the United States had not proved Germany's responsibility for the destructions at Black Tom terminal and Kingsland (R. 261-264). Immediately after the formal announcement of that decision, the Agent of the United States sought a rehearing of the cases (R. 85) and practically continuously from that time to the final decision on October 30, 1939, the sabotage cases were in active litigation before the Commission.

After intermediate petitions for rehearing based on other grounds had been denied (R. 85-8), a petition was filed on May 4, 1933, to reopen the cases on the ground that the decision of 1930 and a subsequent decision of 1932 had been obtained by fraud (R. 115-121). Conflicting opinions as to the right of the Commission to reopen were expressed by the two national Commissioners (R. 121-134). The German Ambassador informed the State Department that his Government took the position that the Commission had no power even to consider the question of reopening (R. 123-124). The State Department took the position that the question was one for the Commission to decide, and should be referred to the Umpire (R. 123), which was done. Under date of December 15, 1933, in a decision rendered by the Honorable Owen J. Roberts as Umpire, the Commission held that it had power to reopen the cases and "either confirm the decisions heretofore made or alter them as justice and right may demand" (R. 45-59). In 1934 the two Governments agreed, by formal exchange of notes, that the sabotage claims were still pending before the

Commission (R. 135-37). Additional evidence was filed by both Governments and extended argument was had before the Commission. Thereupon, on June 3, 1936, the Commission *unanimously* (the German Commissioner participating) set aside its earlier decision of December 3, 1932, also rendered by Mr. Justice Roberts as Umpire, dismissing an earlier petition for rehearing (R. 138-140).

The 1939 Decisions and Awards of the Commission

After an interval of a year resulting from a request for adjournment on the part of Germany,* more witnesses were examined and additional evidence was filed by the Agents of both Governments (R. 95-8, 158). In January, 1939, the cases were again argued at length before the full Commission (R. 96). In his brief and again at the close of the hearings in January, 1939, the American Agent requested not only that the cases be reopened but that the Commission render a final decision on the merits (R. 96-8). The Commission thereupon entered upon its deliberations, during the course of which the Umpire and the American Commissioner each expressed the view that the decision of October 16, 1930, had been induced by fraud in the evidence presented by Germany (R. 60). The Commission then proceeded, at the specific request of the German Commissioner, to determine whether, in the record as it then stood, there was sufficient proof of Germany's responsibility

* The interval was consumed in settlement negotiations requested by Germany (R. 141-42) resulting in an agreement of settlement at Munich covering the sabotage cases. The German Agent, however, declined to effectuate that agreement before the Commission (R. 96).

to justify setting aside the 1930 decision (R. 60, 103, 149-50). In the course of that investigation, the German Commissioner, finding that the Umpire held views contrary to his on the questions of fraud and of Germany's responsibility for the explosions, retired as a member of the Commission in an attempt to avoid a decision adverse to Germany, and thus frustrate the work of the Commission (R. 145-52, 159, 217, 290-91).

Personal notice was given to the German Agent of a meeting of the Commission to be held on June 15, 1939 (R. 99). In response to this notice, and prior to said meeting, Germany stated through announcements made both by its Agent and by its diplomatic representative that it would ignore the meeting (R. 99, 100).

At the June 15, 1939, meeting of the Commission, the Umpire announced his decision setting aside the decision of October 16, 1930, reopening the cases, and finding, on the record as it then stood, that the liability of Germany for both explosions had been established (R. 59-62). The American Agent thereupon moved again for the entry of awards in favor of the United States (R. 105-06). That motion was granted and the order entered thereon provided that the awards would be considered at a further meeting to be held on notice (R. 106). No request was or has been made by Germany to introduce any additional evidence.

Pursuant to the order of June 15, 1939, the Commission met on October 30, 1939, again after personal notice to the German Agent (R. 179-80) and after a thorough study of the records and proof on file relating to damages (R. 107). At that October meeting, awards in favor of the United States in each of

the 153 sabotage claims growing out of the two explosions were granted by the Commission (id.).

At that same October meeting the Commission also disposed of the only other case pending before it by dismissing the claim. With the disposal of that case and the granting of the sabotage awards, all the cases which the two Governments, by the exchange of notes dated May 7, 1934, had agreed were the only cases pending before the Commission (R. 135-137), were determined (R. 112).

Nationality of One of the Awardholders

One of the awards entered on October 30, 1939, was in favor of the United States on behalf of Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, whose offices, business and property were located in the United States. The claim on behalf of this corporation was based upon the destruction by German sabotage agents of its plant at Kingsland, New Jersey. All of the stock of the New York corporation, as had been disclosed to the Department of State, to the Commission and to Germany many years prior to the entry of the award, was owned by a Canadian corporation, part of whose stock was owned by American nationals and part by nationals of other countries (R. 185-86). In 1936, the German Agent moved to dismiss the claim on the theory that the New York corporation was not an American national within the meaning of the Executive Agreement of August 10, 1922 (R. 185). Prior to the retirement of the German Commissioner, both the German Agent and the American Agent had submitted briefs directed to this motion (R. 183). The Umpire in his decision of October 30, 1939, held that Agency of

Canadian Car & Foundry Company, Ltd. was an American national within the meaning of the Executive Agreement of August 10, 1922, and denied the motion of the German Agent (R. 195).

Petitioners' Attacks on the Awards Were Considered and Rejected by Both the State Department and the Mixed Claims Commission.

(a) Germany had contended (and petitioners take the same position) that even if the Commission's 1930 decision in the sabotage cases had been obtained by fraud and suppression, there was nothing that the Commission or Umpire could do about it. The position taken by the Secretary of State on this contention, stated in his communication of October 19, 1933, was that the Commission had the power to determine its own jurisdiction in this respect.* The decision of the Commission rejecting the German contention was rendered by the Umpire on December 15, 1933 (R. 45-59).

(b) When the German Commissioner, aware that the other two members intended to sustain the charges of fraud and to reopen the case and that they

* "It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself. It is understood that the American and German Commissioners hold divergent views on this question and that in a normal course of procedure, under the claims agreement and the rules of procedure adopted by the Commission, the matter would be submitted to the Umpire for decision.

"It is desired that you promptly bring this communication and its enclosure to the attention of the American Commissioner or the full Commission, as in your judgment may seem proper, for the purpose of obtaining the decision of the Umpire on this disputed point" (R. 89-90).

were convinced that Germany was responsible for the explosions, retired for the purpose of preventing such decision, the German Government claimed that no decision could be rendered without him. Prior to the Commission's decision of October 30, 1939, and to the Secretary of State's certification of the awards on October 31, 1939, both the Commission and the Secretary had been repeatedly apprised of this position by the German Embassy (R. 153-54, 291-94, 195-216) and by one of petitioners (R. 307-11). Both the Umpire and the Secretary of State rejected such contentions. The Secretary of State in his letter of October 18, 1939, to the German Charge d'Affaires said:

"I have entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite your severe and, I believe, entirely unwarranted criticisms, and I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion" (R. 217).

(c) The litigation before the Commission and its decision on the question of the nationality of Agency of Canadian Car & Foundry Company have been described (*supra*, page 11). The State Department had the facts before it when it originally espoused the claim (R. 185-86) and Germany and one of petitioners raised the question before the Department again in 1939 prior to the Secretary of State's certification of the awards (R. 207-08, 314-15).

Thus, all questions which petitioners seek to have the domestic courts review

(i) involve interpretation of the Executive Agreement of August 10, 1922, between the United States and Germany in order to decide the powers therein granted to the Mixed Claims Commission which that Agreement established to determine questions in dispute between the two sovereign Governments;

(ii) have been determined by said Commission in litigation between the United States and Germany, which had agreed that the Commission's decisions should be "final and binding"; and

(iii) have been dealt with by the Secretary of State, with full knowledge of the alleged defects in the Commission's decisions, in conducting the relations of this country with Germany.

Finally, the Secretary of State has accepted the awards of the Commission and, by certifying them to the Secretary of the Treasury for payment, has completed the final act required of him under the Settlement of War Claims Act of 1928.

Reasons Why the Writs Should Not Be Granted

The petitions present neither any conflict of authority nor any doubtful or important question of general law requiring further decision of this Court.

(1) The District Court and the Court of Appeals decided that no justiciable question was presented by the petitioners. These decisions are in accord with an unbroken line of decisions of this Court from the earliest days, followed by the lower Federal and

State courts and approved by the text writers. No authority for judicial interference with the executive department's conduct of foreign relations (the necessary result of granting the petitions) has been cited by petitioners.

(2) If determination of the question were within the bounds of proper judicial action and this Court were to consider the validity of the sabotage awards, it would find the precedents overwhelmingly in support of their validity as against all three grounds petitioners seek to raise.

(3) All the challenges to the validity of the sabotage awards were placed before the Mixed Claims Commission and the State Department by Germany and by one of petitioners. The petitioners claim only through the United States, a party to the litigation before the Commission, and the decisions of the Mixed Claims Commission, accepted by the State Department, may not be collaterally attacked by petitioners.

(4) Petitioners' attempts to obtain judicial interference with the Executive Department should not be encouraged by further judicial review. The sabotage claims have been in litigation for sixteen years and only further delay at the expense of the sabotage awardholders would result from granting the writs.

Argument

POINT ONE

The validity of the awards of the Mixed Claims Commission is not subject to judicial review.

Our courts have consistently refrained from inquiry into the question whether a treaty has been violated by the legislative or executive branch of the Government to the damage of an individual, where such inquiry would trespass on the conduct of this country's foreign relations. See *Ware v. Hylton*, 3 Dall. 199, 260 (1796); *Whitney v. Robertson*, 124 U. S. 190, 193-195 (1888); *Botiller v. Dominguez*, 130 U. S. 238, 247 (1889); *George E. Warren Corporation v. United States*, 94 F. (2d) 597 (C. C. A. 2d, 1938), cert. den: 304 U. S. 572; and cf. *Rustomjee v. The Queen* [1876-77] 2 Q. B. D. 69, 74.

Certain types of treaties, such, for example, as extradition treaties, directly affect or create rights of individuals, and, when they become domestic law under the Constitution, may be interpreted by the courts, at the suit of individuals, so long as there is no interference with the conduct of foreign relations. But this agreement for arbitration is not of that type. It is an international compact to provide awards to the United States for violation of its neutrality. Only the Governments are parties before the Commission. Every claimant derives what rights he has from and under the United States.

Even in extradition cases, courts refuse to consider questions of foreign relations within the State Department's domain. *Terlinden v. Ames*, 184 U. S. 270 (1902); and *Charlton v. Kelly*, 229 U. S. 447 (1913).

The opinion of the Court of Appeals for the District of Columbia in the instant case is so complete and its citation of authorities ~~so~~ exhaustive that it leaves little more to be said on this point. We have found no case, and the petitioners cite none, in which any court has even suggested that it had power, in the absence of specific legislation, to pass upon the validity of an award of an international tribunal adjudicating disputes between nations.

Mr. Justice Miller reviews the numerous cases in this Court holding that the judicial branch will not interfere in political controversies and that questions arising between nations in the conduct of foreign relations are political "questions" with which the courts of both this country and England have refused to deal from early times (R. 341-51).*

Likewise, the opinion below properly lays emphasis on the fact that in this case not only did the Mixed Claims Commission pass on the questions as to its powers, but our State Department, in diplomatic controversy with the German Government, has taken a position on them contrary to that which petitioners ask this Court judicially to declare (see *supra*, pages 12 to 14). Finally, the State Department, with all the objections to the same awards before it which petitioners seek to raise, certified the awards to the Secretary of the Treasury for payment.

* See also *Coleman v. Miller*, 307 U. S. 433, at 454-455, 457, 460 (1939); *West Rand Central Gold Mining Company, Ltd. v. The King* [1905] 2 K. B. 391; Crandall, *Treaties, Their Making and Enforcement* (Studies in History, Economics and Public Law, Columbia University, Vol. 21, No. 1, 1904) p. 221; and Potter, *The "Political" Question in International Law in the Courts of the United States*, VIII *Southwestern Political and Social Science Quarterly* 127 (1927).

The provision of the Settlement of War Claims Act of 1928 that awards shall be paid only when certified to the Treasury by the Secretary of State is a legislative recognition of the fact that the acceptance or rejection by the United States of awards is a question for the executive branch entrusted to the Department of State. The Secretary of State had full power and authority to reject the awards if they had been invalid. *Frelinghuysen v. Key*, 110 U. S. 63 (1884); *Boynton v. Blaine*, 139 U. S. 306 (1891); and *La Abra Silver Mining Co. v. U. S.*, 175 U. S. 423 (1899).

The Executive Agreement of August 10, 1922, was an international compact to provide the machinery for determining claims of the United States respecting certain acts committed by the German Government. As stated by Secretary of State Frelinghuysen with reference to a similar tribunal:

"The Commission is not a judicial tribunal adjudging private rights but an international tribunal adjudging national rights" (Moore; VI Digest Int. Law, §1055, pp. 1015-6).

See also (with specific reference to the Mixed Claims Commission, United States and Germany) *Standard Marine Insurance Co. v. Westchester Fire Insurance Co.*, 19 F. Supp. 334, at p. 338 (S. D. N. Y. 1937), aff'd 93 F. (2d) 286 (C. C. A. 2nd, 1937); cf. *U. S. v. Bayard*, 127 U. S. 251, 259 (1888); *U. S. v. Diekelman*, 92 U. S. 520, 524 (1875); Distribution of Alsop Award by the Secretary of State, Opinion of the Solicitor for the Department of State, J. Reuben Clark, Jr., Aug. 14, 1912 (Wash., Govt. Printing Office, 1912) p. 14.

Petitioners, as they did below, seek support in the line of cases dealing with conflicts over asserted rights to receive payment of an award, arising between original claimants and those claiming under them, or between two or more persons whose rights are derivative and who claim through assignment or transfers—disputes as to the proper person entitled to the money on payment of a successful claim.*

As both courts below pointed out, no such question is involved in this litigation (R. 298, 350-51). The determination of the proper person entitled to the proceeds of a particular award, once the United States has established a claim, presents no complication involving the executive department's action or power in international affairs and is a matter of domestic law for the local courts. This case would be comparable to those cited were petitioners alleging that they owned Black Tom Island when German sabotage agents destroyed it in July, 1916.

Petitioners' characterization of the instant controversy as "a contest between adverse American claimants to share in a fund created by an act of Congress" (No. 381, p. 3) and as "a conflict of property rights under the statutes and treaties of the United States" (No. 381, p. 16) tends to obscure the real nature of their claim. Petitioners concededly have an interest

* *Orinoco Co. v. Orinoco Iron Co.*, 296 Fed. 965 (App. D. C., 1924), *aff'd sub nom. Mellon v. Orinoco Iron Co.*, 266 U. S. 121 (1924); *Houston v. Ormes*, 252 U. S. 469 (1920); *Comegys v. Vasse*, 1 Peters 193 (1828); *Frevall v. Bache*, 14 Peters 95 (1840); *Judson v. Corcoran*, 17 How. 611 (1855); *Williams v. Heard*, 140 U. S. 529 (1891); *Matter of Westbrook*, 228 App. Div. 549 (N. Y. 1930). See also *Doerschuck v. Mellon and Z. & F. Assets Realization Corp.*, 55 F. (2d) 741 (App. D. C., 1931).

in the German Special Deposit Account in that, to the extent that funds may be available; and subject to the rights of other awardholders and to the conditions of the Act relating to priorities among the various classes of claims, they are entitled to the payment of their awards out of such Account. Without such interest, they would have no standing whatever, for any reason, to challenge the legality of a proposed disbursement from the Account by the Secretary of the Treasury. It does not follow, however, that the existence of an interest which could properly be accorded judicial protection upon grounds afforded by the Act, authorizes judicial inquiry into all other matters which might conceivably affect that interest.

If the basis of petitioners' complaint were that the Secretary of the Treasury was about to make a payment from the Account in respect of an award which had not been certified by the Secretary of State and thus accepted by the United States (as required by the Settlement of War Claims Act), or that the amount of a proposed payment did not conform to the provisions of the Act prescribing the priorities of payment, a different question would be presented. But no such complaint is made here.

The matters of which petitioners do complain relate to the validity of the awards and the proper interpretation of the Treaty and Agreement pursuant to which the Commission was created. The German Special Deposit Account comprises moneys received by the United States from Germany to satisfy Germany's financial obligations assumed under the Treaty of Berlin. The two Governments established (and Congress recognized) the Mixed Claims Commission as the tribunal to decide the

extent of those obligations. These were matters in dispute between the two Governments, not between American citizens and Germany. The propriety of the acceptance by the United States of the Commission's action is no more judicially reviewable than would have been the rejection of the awards by the United States, or an agreement between the two Governments, prior to the granting of the awards, that the claims on which they were based should be dismissed.

To grant the relief sought by petitioners, this Court would have to place itself in square conflict with the State Department in an actual, not merely a potential, controversy with a foreign government respecting the interpretation and effect of an international agreement.

The decision below is not in conflict with that of any other Circuit, is upon a question already settled by this Court, is not in conflict with, indeed it follows, applicable decisions of this Court, and it presents none of the grounds for certiorari specified in Rule 38 of the Supreme Court Rules.

POINT TWO

The awards were valid and the Mixed Claims Commission acted within its powers.

Although the courts below rested their judgments on unassailable grounds, it is appropriate to call attention to other points raised below and presented by the record, which would require an affirmance of the judgment if this Court should examine into the validity of the sabotage awards.

Those points are as follows:

1. *The Commission had power to reopen the cases after its prior decision rejecting the claims.*

The cases were reopened not because of occasional perjury of witnesses for Germany, but on proof that the entire defense was corrupt and that the perjury and suppression of facts were organized by responsible officials of the German Government.

Respecting the power of the Commission to reconsider a decision procured by such means, we refer to the convincing opinion of the Umpire rendered December 15, 1933 (R. 45-59). That opinion concludes with this statement:

"The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

"I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence

and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand."

At one time, when a question of reopening these cases was argued, the German Agent conceded that the Commission had power to decide the question of its own jurisdiction (R. 87-8).

Germany, when she found that the question was to be decided against her, attempted to deny the power of the Commission to settle the question for itself. She first conceded the point, but her later position was in substance that the Commission had jurisdiction to decide on its power to reopen, provided it was decided in accordance with the German contention, but not otherwise.

Nevertheless, after the law point was settled in 1933, Germany acquiesced (R. 135-37) and continued for over five years actively to litigate the claims (R. 95-7, 157-58).

The Commission has repeatedly reopened and corrected its prior decisions in other cases (R. 93-4) and by the decision of June 3, 1936, in these cases, in which the German Commissioner concurred, the Commission set aside its prior decision of December 3, 1932 (R. 138-40).

Petitioner in No. 381 attempts to distinguish this case from other cases in which the Commission reopened and altered its earlier decisions on the ground that in such other cases the Agents of both Governments consented to the reopening (Brief in No. 381, p. 37). That distinction does not, of course, apply to the decision of June 3, 1936, and does not constitute a valid distinction in any case. The Umpire

answered petitioner's argument when Germany so argued in 1933. He pointed out that additional power could be conferred upon the tribunal only by the parties which called it into being and, therefore, if a case might be reopened by consent of the national Agents, the same action could be taken without their consent (R. 56).

We know of no case—and petitioners have cited none—where it has been held that a commission was without jurisdiction to consider a petition for rehearing properly presented to it while it was continuing to function as a judicial body. The argument that it cannot do so, even to correct fraud, is unconscionable and would pervert both justice and the intention of the parties.

The cases relied upon by petitioner (Brief in No. 381, pp. 34-38) do not support the proposition for which they are cited. All such cases were cited to the Commission in the brief filed in 1937 on behalf of a group of similarly situated awardholders, and their inapplicability was then pointed out.

Thus the *Cerruti* case (5 Moore, International Arbitrations, p. 4699) involved a submission to Grover Cleveland, as President of the United States, of a claim of Italy against Colombia. President Cleveland's award was rendered two days before his term of office expired and the "protest" by the Colombian government—which was *not* a petition for rehearing—was filed with the Secretary of State in the McKinley administration.

In the *Claim of Manuel de Cala* (2 Moore, International Arbitrations, p. 1273), the application for review was made, not to the tribunal which had rendered the decision, an international commission, but

to a separate domestic commission which had come into existence eight years after the international commission had ceased to function. No application was ever made to the international commission to review its own decision.

Similarly, in the *Claim of Benjamin Weil* (2 Moore, International Arbitrations, p. 1324), the application for a rehearing was made nine months after the national commissioners had concluded their labors and had so announced. The application was presented, not to the two commissioners, but in the first instance to the umpire, who continued to function solely for the purpose of deciding cases before him in which he had not then rendered opinions. The terms of the submission by the two Governments in creating the Commission had specifically provided that "from and after the conclusion of the proceedings of the Commission" the decision would be "considered and treated as finally settled, barred, and thenceforth inadmissible" (Art. V of the Claims Convention of 1868 with Mexico, Malloy, Treaties, p. 1131). The same commission had earlier recognized its power, while it still sat, to reopen cases by reversing its former ruling in the *Claim of Henry S. Schreck* (Sir Edward Thornton, Umpire).*

Additional instances in which commissions have reopened cases where the provisions respecting the final and binding character of the decisions were at least as strong as they are in the present case can readily be cited. For example, *Bouillotte's case*, French Commission of 1880 (3 Moore, Interna-

* This appears from the reference to this claim in the case of *Young, Smith & Co.*, 3 Moore, International Arbitrations, pp. 2184, 2186, as well as from the MSS Records of the Department of State.

tional Arbitrations, pp. 2650-52. MSS Records, Dep't of State); *Claim of F. M. de Acosta y Foster* (Spanish Commission of 1871) (3 Moore, International Arbitrations, pp. 2187-88, MSS Records, Dep't of State), where the decision was twice reopened, once with consent and once without consent; *C. H. Campbell*, No. 94, and *A. A. Arango v. Spain*, No. 95 Spanish Commission of 1871 (MSS Records, Dep't of State).

That other commissions—like the Mixed Claims Commission—have often refused to grant rehearings in particular cases does not indicate any lack of power to grant a rehearing under appropriate circumstances, such as when fraud is shown.

2. *The withdrawal of the German Commissioner did not deprive the Umpire and American Commissioner of power to dispose of the cases.*

On March 1, 1939, the German Commissioner, after having sat during seventeen days of argument in 1936 and ten days in 1939, and after the case was submitted and the Commission had been engaged in its deliberations for some three weeks, suddenly announced his retirement.

That he did so after learning the decision was going against Germany and in order to frustrate the arbitration, is clear (R. 145-52, 159, 217, 290-91). The German Commissioner himself stated that the reason for his retirement was his conviction that the Umpire had reached a conclusion and was no longer open-minded (R. 145-47).

The authorities are settled that such attempt to frustrate the arbitration was unavailing and did not

prevent the Umpire and the American Commissioner from disposing of the cases. *Republic of Colombia v. Cauca Company*, 190 U. S. 524 (1903); *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N. Y. 398, 148 N. E. 562 (1925); *Grand Rapids Ry. Co. v. Jaqua*, 115 N. E. 73 (Ind. 1917); *Atchison, Topeka & Santa Fe Ry. Co. v. Brotherhood*, 26 F. (2d) 413 (C. C. A. 7th, 1928); *State v. Tucker*, 166 N. W. 820 (N. D. 1918); *Sturges, Commercial Arbitrations and Awards* (1930), pp. 427-428, and cases there cited; *Burtlet v. Smith*, 94 Eng. Rep. 587 (King's Bench, 1734); *Dalling v. Matchett*, 125 Eng. Rep. 1138 (Common Pleas, 1740). See also Circuit Judge Goff's apt characterization of the Colombian Commissioner's attempt to scuttle his commission in the *Colombia v. Cauca* case, equally apt here (106 Fed. 337, at 348-49, aff'd 190 U. S. 524).

The opinion of the American Commissioner (R. 154-79), adopted by the Umpire in his decision of June 15, 1939 (R. 60), reviews such authorities in detail.

Those cases, concerning private arbitrations, generally deal with situations where the resignation of an arbitrator took place after all proofs and arguments had been presented. But *Toledo S. S. Co. v. Zenith Transp. Co.*, 184 Fed. 391 (C. C. A. 6th, 1911), held that an arbitral tribunal, justified in determining the merits of a claim despite withdrawal of one of the arbitrators, may thereafter proceed to determine the question of damages.

In the instant case the only question which had not been argued prior to the retirement was the damage question. All the evidence on damages had been filed years earlier (R. 108). The agreement of the American Agent eleven years before that briefs then

filed should be restricted solely to the question of Germany's liability (R. 84) has no bearing on the case. Between the decision of June 15, 1939, and the entry of the awards on October 30, 1939, during which period the Commission considered the question of the amount of damages (R. 107) (and indeed substantially reduced the claims), Germany had ample opportunity to argue the question of damages. Germany's refusal to participate as a litigant cannot avail the petitioners:

The questions presented to the Commission for its decision prior to the retirement of the German Commissioner included:

(a) the question whether the United States had proved German fraud sufficient to require a re-opening of the cases (R. 102);

(b) the question whether, on the record as it then stood, the United States had made out its case on the merits (R. 60-2, 96-8, 103, 158-59, 290);

(c) the question of the nationality of Agency of Canadian Car & Foundry Company (R. 182-84, 195); and

(d) the question whether a final decision on the merits should be made (R. 97, 98).

When the Commission (after the German Commissioner's resignation) on June 15, 1939, rendered its decision reopening the case and setting aside the former decision, it made a finding, *on the record as it stood*, that Germany had caused the explosions. That finding was in direct response to the insistence of the German Commissioner that the point be examined, as it would be futile to reopen if the United States

had not made a case on the merits (R. 60, 105-06). From 1933 to 1939 both Governments had filed voluminous evidence relevant to the essential merits of the claims (R. 61, 97). That finding, *on the record as it stood*, left Germany free to supplement the record with further proof. She refused to appear further, and on the record there was nothing for the Commission to do but determine damages, which it did.

As Secretary of State Evarts stated with respect to the American-Spanish Commission, convention of February 1871,

"[It is] beyond the competence of either government to interfere with, direct or obstruct its deliberations." (3 Moore, International Arbitrations, p. 2599 and MSS Notes of the United States to the Spanish Legation.)

Mr. John Bassett Moore, who now is named as counsel for one of the petitioners, when commenting on the question of the right of withdrawal in connection with the arbitration which took place under the Jay Treaty of 1794, said:

"* * * On the other hand, it can hardly be supposed that the governments, in agreeing to Articles VI and VII, had it in mind to create a device by which either of them, or the commissioner named by either of them, might by withdrawing, readily prevent the majority of a duly constituted board from exercising its constitutional powers.

"As the claim of a right to withdraw cannot reasonably be deduced from the terms of the treaty, so likewise is it unjustified under interna-

tional law. Its justification in the present instances, whether at London or at Philadelphia, must, therefore, be sought in moral rather than in legal considerations." (3 Moore, International Adjudications, Modern Series, p. 170.)

Under all the authorities, including those applying even to private arbitrations, the attempted frustration was ineffective.

There is another clear ground for holding that Germany could not frustrate the arbitration by withdrawing her Commissioner.

(i) The Knox-Porter Resolution, approved July 2, 1921 (42 Stat. 105-6) provided that all property of Germany and its nationals in possession of the United States should not be returned until such time as Germany had made "suitable provision" for satisfaction of claims of American nationals.

(ii) The substance of the resolution was embodied in the Treaty of Berlin of August 25, 1921 (42 Stat. 1939).

(iii) The Executive Agreement of August 10, 1922 (42 Stat. 2200) establishing the Mixed Claims Commission, was the "suitable provision" referred to in the Treaty of Berlin.

(iv) The Settlement of War Claims Act of 1928 (45 Stat. 254), which provided for the return to Germany of seized property, was enacted in reliance upon the fact that the Commission had been established and that Germany could not by its own act prevent action by the Commission. The Hearings before the Senate

Finance Committee, 70th Congress, H.R. 7201, January 23-26, 1928, pp. 134-9, 191-5, disclose that a representative of this same respondent Lehigh Valley Railroad Company (with remarkable foresight as events have proved) appeared and objected to the return of German property, until the Mixed Claims Commission had decided the sabotage cases. He feared that, if German property was first returned, Germany would by some device disrupt the Commission and prevent sabotage awards. Impressed by this argument, the Senate Committee called in Judge Parker, then Umpire of the Commission, and questioned him as to what the Commission could do if Germany declined to appear before a decision could be rendered in the sabotage claims. Judge Parker stated that the Commission could proceed to decide the cases even if Germany went so far as to refuse to appear or submit any testimony (R. 83-4). Furthermore, the record of the hearings contains letters to the Committee written by representatives of the German Government, insisting that it was unthinkable that Germany would endeavor to disrupt the Commission. Satisfied by these representations, the bill was favorably reported and passed.

(v) Since its passage more than \$175,000,000 of German property has been returned, in reliance on the continued functioning of the Commission. Under these circumstances, having received benefits under the Settlement of War Claims Act, Germany could not at any stage thereafter frustrate proceedings before the Commission.

• Petitioners' Attacks on Commission Procedure

Petitioners argue (Brief in No. 381, Pt. IV) that the question of the merits of the claims was not properly before the Commission because the original application filed in 1933 sought only a rehearing. They therefore assert that the Commission granted the awards without affording adequate opportunity to Germany to litigate the merits of the claims.

The argument disregards the facts that the merits of the claims had been exhaustively tried and argued before the Commission, that both sides had filed thousands of pages of evidence dealing directly with the merits and that the American Agent had repeatedly requested the Commission to render a finding on the merits upon the ground that once a decision had been rendered on the issue of fraud, any other proceedings would be a mere formality (R. 96-8). In January, 1939, the American Agent moved again for such a ruling just prior to the submission of the case to the Commission (R. 97-8).

Furthermore, as pointed out by the American Agent, the claimed distinction between fraud and merits in this case was unreal—a fact which had become increasingly evident as the cases proceeded. The same evidence was relevant to both. For example, one of the questions in the so-called fraud issue was the authenticity of a certain secret message, which was eventually found to be genuine. But the Commission in 1932 had stated that the message, if authentic, was conclusive on the question of liability (R. 120).

Petitioners' attempt to create the impression that the remaining members of the Commission acted hastily and without adequate consideration is wholly

unjustified. Although the blunt letters from the German Agent and the German Charge d'Affaires presumably made it unnecessary to notify the German Agent of further meetings (R. 99, 100, 195-216, 291-94), in fact the Commission gave him personal notice both of the meeting of June 15, 1939 and of the meeting of October 30, 1939. The German Agent failed to appear at either meeting, notwithstanding Germany was well aware of the fact that awards in favor of the United States were under consideration (R. 196).

Both the Umpire and the American Commissioner proceeded with the utmost care and consideration for the rights of Germany after the retirement of the German Commissioner. At the meeting of June 15, 1939, although the circumstances amply justified the decision finally disposing of the cases, the decision handed down by the Umpire at the opening of the meeting was confined to the granting of the petition for a rehearing and the finding of fact (requested by the German Commissioner) whether, on the record as it then stood, the United States had made out its case on the merits (R. 59-60). It was only after the Commission had so found and after Germany's intention not to file further evidence had become apparent that the Umpire granted the motion of the American Agent to direct the entry of awards in favor of the United States (R. 105-06). The order entered on June 15, 1939, provided, in part, as follows:

“* * * the American Agent is directed to prepare and submit to the Commission for its approval awards in each of the pending sabotage claims. These awards will be considered at a further meeting of the Commission to be called.

on notice, and appropriate action thereon will then be taken" (R. 106).

Petitioners' other argument that the German Commissioner's attempted frustration was effective is based on the premise that the national Commissioners were not in disagreement or "at a point of difference" in their deliberations.* The Umpire himself, who was present at all hearings, found that such a disagreement existed (R. 59-60).

With regard to the argument based on the fact that the German Commissioner did not sign the certificate of disagreement, petitioners rely upon a rule adopted by the Commission for the convenience of the Umpire. It is clear that no rule of procedure adopted by a tribunal can enlarge or restrict the jurisdiction of that tribunal. *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 629 (1924).

It should also be noted that the general rules of the Commission were substantially modified by the special rules for the conduct of the sabotage cases and the unbroken practice of the Commission in sitting and deliberating as a three-man body in all proceedings connected with all important cases of the Commission (R. 84, 85-6). See also Report of American Commissioner, Mixed Claims Commission, December 30, 1933, U. S. Gov't Printing Office (1934), pages 7-8.

The Umpire's power to proceed without a certificate of disagreement signed by both Commissioners has been settled since Umpire Robert's decision of December 15, 1933, which dealt with the point and

* The Executive Agreement of August 10, 1922 provides: "The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings" (R. 16-7).

was never questioned by either Government (R. 50-52). Plaintiffs' contention would lead to the absurd result that the Umpire, even though he was present and witnessed the disagreement (as he did here), could never decide a point in dispute unless the German Commissioner consented in writing that he should.

Furthermore (see pages 30 and 31 of this brief) Germany, having had property returned to her or her nationals under the Settlement of War Claims Act passed in reliance on her continued participation in this arbitration, could not frustrate the arbitration by refusing or failing to sign a certificate of disagreement or by withdrawing her Commissioner so that a disagreement could not occur.

3. *Agency of Canadian Car & Foundry Company is an American national within the meaning of the Executive Agreement of August 10, 1922.*

That concern is a New York corporation. Its offices always have been in New York City. Practically all its business was done in the United States. Its plant, which was destroyed, was located at Kingsland, New Jersey, where it employed two thousand men (R. 185). The petitioners assail the award to the United States on behalf of that claimant as void and beyond the power of the Commission on the theory that the corporation was not an American national within the meaning of the agreement establishing the Commission. All of the stock of the New York corporation was owned by a Canadian corporation, and the portion of the Canadian corporation's stock held by citizens of the United States varied from 30% to 45% (R. 185-86).

³The question whether its losses were the proper subject of an award involved questions of fact and

also interpretation of the Executive Agreement and came before the Commission for decision in the regular course of its duties. In every claim the Commission was required to determine the nationality of the claimant.

The argument that the Commission did not have power to decide questions of fact and law respecting nationality by decisions "binding on the two governments" would result in leaving the question of nationality to be settled in every case by separate diplomatic agreement and then to be litigated in the courts.

The full facts affecting nationality were disclosed to the State Department and to Germany many years ago (R. 185-86). The State Department espoused the claim (R. 186). Not until December 7, 1936, nine years after the United States filed the claim with the Commission, and after thousands of pages of evidence had been taken respecting its merits, did Germany raise the question of nationality. On December 7, 1936 (after the first argument on the fraud petition for rehearing) Germany filed a motion raising the point; on March 18, 1937, the German Agent withdrew his motion; on April 27, 1937, he renewed it (R. 183). After both Agents had filed briefs on the point, the Commission denied the motion (R. 195).

The propriety of the award is so amply supported by the authorities cited and discussed in the opinion of the American Commissioner of October 30, 1939 (R. 182-94), which was concurred in by the Umpire (R. 195), that no useful purpose is served in reviewing those authorities here.

Petitioners' brief merely recites the same cases cited before the Commission and discarded by the Umpire and the American Commissioner as inapplicable to the situation presented by the claim.

POINT THREE

The Commission's decisions on these questions are binding on petitioners.

In years past there was a tendency to examine collaterally the jurisdiction of a judicial tribunal, even though it had considered the jurisdictional point and itself decided the question. That subject has recently been clarified. *Stoll v. Gottlieb*, 305 U. S. 165 (1938); *Treinies v. Sunshine Mining Co.*, 308 U. S. 66 (1939); *Chicot County Drainage District v. Baxter State Bank*, 60 St. Ct. 317 (1940).

In *Stoll v. Gottlieb*, after a District Court had erroneously held, in a decision on the question, that it had jurisdiction over the subject matter of a case before it, this Court refused to allow its judgment to be attacked collaterally. This situation is analogous.

That the Commission had the power to pass on questions of interpretation of the Executive Agreement of August 10, 1922 to determine its own powers cannot be doubted and was conceded by the German Agent (R. 88). Not only did the Commission have that power, but decision of the questions was solely for it. With reference to a determination of the citizenship of a claimant in the American-Venezuelan arbitration of 1903, the American-Venezuelan Commission stated:

"Hence, the Commission, as the sole judge of its jurisdiction must in each case determine for itself the question of such citizenship upon the evidence submitted in that behalf." (*Flutie*

cases—Ralston, Report of Venezuelan Arbitrations of 1903 (Wash., 1904), pp. 38, 41.)

See also *The Betsey*, 4 Moore, International Adjudications (1931) 81, 85, 182, 186; *Hargous (U. S.) v. Mexico* (1839), 2 Moore, International Arbitrations p. 1267; *Rudloff (U. S.) v. Venezuela*, Ralston, Report of Venez. Arb., pp. 182, 185; Greco-Turkish Agreement of December 1, 1926; Permanent Court of International Justice Advisory Opinion No. 16 (August 18, 1928), Public. Ser. B., No. 16, pp. 20, 21.

The Commission's decisions interpreting the Executive Agreement, like its decisions on the validity and amount of claims, are decisions which each Government is bound to accept as final and binding under the provisions of Article VI of the Executive Agreement (R. 18). Secretary of State Evarts came to the same conclusion with respect to the powers of the American-Spanish Commission under the Convention of February, 1871. In reference to the validity of judgments of naturalization of certain American claimants, the Secretary of State pointed out that the Commission's decisions on the "*reach of the jurisdiction accorded by the convention of 1871*" were final and conclusive on both Governments (3 Moore, International Arbitrations, 2599-2600). See also the opinion of Secretary of State Webster with reference to the United States-Mexican Claims Commission established pursuant to the Convention of 1839 (2 *id.*, pp. 1241, 1242).

The Mixed Claims Commission is a judicial tribunal established by the United States and Germany, pursuant to a treaty, and its creation was ratified and confirmed by the Settlement of War Claims Act. Its decisions on these questions raised before it are

binding on the two Governments, and consequently on private persons whose only claims are through one of said Governments.

Conclusion

The decision below was obviously right. The reasons assigned for it are invulnerable. There is no case to the contrary and no conflict. The decision could not have been otherwise, without disregarding a long line of decisions of this Court. The law is settled. In addition to the grounds assigned by the courts below, the petitioners' case could not possibly have succeeded even if the courts had formed their own judgment as to the propriety of these awards.

It is not out of place to note that this litigation, and the resultant delay in payment of these awards, are causing the beneficiaries of these awards (unless Germany resumes payments on her bonds) approximately three thousand dollars per day in loss of use of the money, computed at the rate prescribed in the Settlement of War Claims Act, a total to date of over three-quarters of a million dollars. The respondent, acting on behalf of all the sabotage awardholders, has done its best to expedite the final decision, with no help from the petitioners. Its motions for leave to intervene, and for summary judgment, were both met with attempts at postponement. When the appeal from the District Court was taken, it was the respondent who arranged for immediate certification and printing of the record and moved to advance in the Court of Appeals. To stay the mandate in that court (which has gone down), these petitioners should have filed their petitions for certiorari

in thirty days (by July 3rd). They were filed August 29th. There has been no evidence of any desire on the part of the petitioners to expedite a final decision. They have relied on the reluctance of the Treasury to pay the awards in the face of litigation, and never applied for a temporary injunction, for which a bond would have been required. It is but natural that the sabotage awardholders protest at having this litigation, which they are convinced is wholly without merit, carried further at their expense.

The petitions for certiorari should be denied.

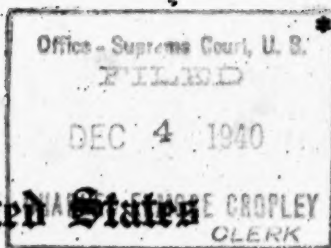
Respectfully submitted,

WILLIAM D. MITCHELL,
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Lehigh Valley Railroad Company

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FILE COPY



Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 381 and 382

Z. & F. ASSETS REALIZATION CORPORATION,
a Delaware corporation; AMERICAN-HAWAIIAN
STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY
MORGENTHAU, Secretary of the Treasury;
LEHIGH VALLEY RAILROAD COMPANY,
Intervener,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR INTERVENER-RESPONDENT
LEHIGH VALLEY RAILROAD COMPANY**

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Supreme Court of the United States

OCTOBER TERM, 1940

Z. & F. ASSETS REALIZATION CORPORATION, a
Delaware corporation; AMERICAN-HAWAIIAN
STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY
MORGENTHAU, Secretary of the Treasury;
LEHIGH VALLEY RAILROAD COMPANY, Inter-
vener,

Respondents

Nos. 381
and 382

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR INTERVENER-RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 295) is reported in 31 F. Supp. 371. The opinion of the Court of Appeals (R. 335) is reported in 114 F. (2d) 464.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered June 3, 1940 (R. 354). The petition for *certiorari* was filed August 29, 1940, and granted October 14, 1940. The jurisdiction of this Court rests on Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioners are the beneficiaries of awards made to the United States on their behalf by the Mixed Claims Commission, United States and Germany, on which have been paid sums in excess of the principal amounts of the awards (R. 42, 75, 111).¹ They brought this suit to restrain the Secretary of State from certifying to the Secretary of the Treasury, and to restrain the latter from paying, 153 later awards made by the Commission to the United States, on behalf of Lehigh Valley Railroad Company and others, for damages resulting from the destruction by German agents of property at Black Tom Island in New York Harbor in July, 1916, and at Kingsland, New Jersey, in January, 1917. The payment of these sabotage awards would reduce the funds otherwise in part available for payment on account of the balances due petitioners.

Petitioners contend that the sabotage awards are invalid and ask that they be held void,

Petitioners' statement of the questions presented (Brief No. 381, pp. 2, 3; Brief No. 382, pp. 7-10) does not, we believe, accurately set forth the principal questions actually presented, nor does it adequately differentiate, from the standpoint of relative significance, between the several contentions which they advance.

The specific questions involved are, therefore, summarized below.

QUESTIONS DECIDED BY THE COMMISSION

1. Power of the Commission to reopen the cases

In 1930 the Commission rendered a decision that the United States had failed to prove its case against Germany,

3
and dismissed the claims. Thereafter, the United States filed a petition to set aside that decision on the ground that it had been obtained by fraud. The Commission (with its membership then full) held in 1933 that it had power to reopen the cases. In 1939, after continuous litigation since 1933 and the production by both Governments of masses of further evidence, the Commission set aside the 1930 decision, held Germany responsible for the Black Tom and Kingsland destructions, and entered awards on the sabotage claims.

Germany had contended before the Commission in 1933 that, even if the first decision had been obtained by fraud, the Commission, though still functioning, was without power to reopen the cases; and was helpless to act.

The petitioners take the same position and claim that the awards are, therefore, void, and ask this Court to overturn the decision of the Commission.

2. Power of the Umpire and the American Commissioner to function after the withdrawal of the German Commissioner

The Commission consisted of two National Commissioners and an Umpire. Unanimity was not required. The concurrence of two was sufficient for a decision.

After argument and submission to the Commission in January, 1939, its three members went into conferences (continuing intermittently until March 1st), during which they considered whether the decision of 1930, in favor of Germany, had been induced by a fraudulent and corrupt defense, and, if so, whether on the entire record there was sufficient proof of Germany's responsibility for the destructions to justify setting aside the 1930 decision. On

4

March 1st the German Commissioner, aware that the two other members intended to sustain the charge of fraud and reopen the case, and that they were convinced that Germany was responsible for the destructions, retired for the purpose of preventing a decision.

The question arises whether that attempt of Germany to frustrate the arbitration was effective to prevent the Umpire and American Commissioner from proceeding to dispose finally of the cases. Germany argued that it was effective.

The two remaining members of the Commission considered this question and held they had the power, and exercised it.

The withdrawal of the German Commissioner also gave rise to certain procedural questions, subordinate to the principal question of the power of the Commission to act at all. These questions are also raised here by petitioners.

3. Nationality of Agency of Canadian Car & Foundry Company

One of the sabotage awards entered on October 30, 1939, was in favor of the United States on behalf of Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, for the destruction of its plant and other property at Kingsland, New Jersey, by German agents. Germany contended before the Commission that foreign ownership of stock of the New York corporation deprived it of its status as an American national. This question, up for decision by the Commission before the German Commissioner withdrew, was decided against Ger-

many after he withdrew. The question was one of mixed fact and law involving an interpretation of the agreement between the two governments establishing the Commission.

One of the petitioners adopts the German contention and asks this Court to overturn that decision of the Commission.

QUESTIONS ARISING SINCE THE SABOTAGE AWARDS WERE MADE, AND THEREFORE NOT DECIDED BY THE COMMISSION

Power of the domestic courts to inquire into the validity of the awards

This question has two aspects.

First—Political matters, including foreign relations, are in the control of the executive, not the judiciary.

The agreement for arbitration was an international compact between two governments. The questions above outlined were not only submitted to and decided by the Commission, but have been the subject of a diplomatic dispute between Germany and the United States. The Secretary of State has consistently taken the position that the Commission had power to settle the question of its power to reopen and its competency to act in the situations above described. He has rejected Germany's protests against the reopening and the continued functioning of the Commission after Germany withdrew, and has recognized the awards.

The question arises whether this controversy is of a political nature involving foreign relations, belonging under the Constitution exclusively to the Executive Department, and thus not justiciable in the courts.

It was on this point that both of the courts below rested their decisions.

Second—The Commission's decisions are conclusive, not only because the Commission was an international tribunal, but also by reason of the familiar principle of *res judicata* applicable to the decisions of any tribunal.

Each question as to the powers of the Commission and the validity of the awards, now raised by petitioners, has been considered and decided by the Commission. Was it not competent for the Commission to decide such questions which came before it for decision? Are its decisions not binding on the two governments, and, therefore, on any private citizen whose only interest is through and under the United States? Is it open to any private citizen to question an award which is acceptable to the United States? Has either government contemplated or consented that the decisions of the Commission are subject to review in the domestic courts of either country?

There is also a subordinate question relating to the propriety of summary judgment in this case.

TREATIES AND STATUTES INVOLVED

The Knox-Porter Resolution (42 Stat. 105, 106), approved July 2, 1921, provided that all property of the German Government, and of its nationals, which, on or after April 6, 1917, had come into the possession or under control of the United States, should be retained by the United States

"until such time as the Imperial German Government * * * shall have * * * made suitable provision

for the satisfaction of all claims * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered through the acts of the Imperial German Government, or its agents * * * since July 31, 1914, loss, damage, or injury to their persons or property * * * " (R. 78-79).

The foregoing resolution was incorporated in the Treaty of Berlin of August 25, 1921 (42 Stat. 1939). Subsequently, an Executive Agreement between the United States and Germany was signed at Berlin on August 10, 1922 (42 Stat. 2200; R. 15-18) providing for the creation of a Mixed Claims Commission to determine the amount to be paid by Germany to the United States in satisfaction of Germany's financial obligations under the Treaty. The Commission was to consist of three members, one commissioner to be appointed by each government and an umpire to be selected by agreement of the two governments (Art. II). It was provided that the Umpire should

"decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the Umpire or any of the Commissioners die or retire, or be unable for any reason to discharge his functions the same procedure shall be followed for filling the vacancy as was followed in appointing him" (Art. II) [Italics supplied];

and that

"The decisions of the commission and those of the umpire (in case there may be any) shall be

accepted as final and binding upon the two Governments" (Art. VI);

and that

"The two Governments may designate agents and counsel who may present oral or written arguments to the commission" (Art. VI).

The parties before the Commission were the two governments, United States and Germany (R. 81, 82). All claims presented to the Commission were made by the United States, on its own behalf or on behalf of its nationals, and the conduct and control of the prosecution of such claims rested solely with the United States (R. 81).

On March 10, 1928, the Congress of the United States enacted the Settlement of War Claims Act of 1928 (45 Stat. 254), which Act created in the United States Treasury a German Special Deposit Account, composed in part of all sums invested or transferred by the Alien Property Custodian under the Trading with the Enemy Act, and of all money received by the United States in respect of claims against Germany on account of the awards of the Mixed Claims Commission. The Act provides that out of that Account shall be paid the losses of American nationals which have been the subject of awards. Pertinent provisions of this Act are as follows:

"Sec. 2. (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the 'Mixed Claims Commission').

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(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.

(c) The Secretary of the Treasury is authorized and directed to pay annually (as nearly as may be) simple interest, at the rate of 5 per centum per annum, upon the amounts payable under subsection (b) and remaining unpaid, beginning January 1, 1928, until paid.

(d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4."

The Settlement of War Claims Act also made provision for the immediate return to the former German owners of 80% of the property referred to in the Knox-Porter Resolution, and for immediate payments to German holders of 50% of the awards of the War Claims Arbiter, the eventual return to German nationals of the balance of the seized German property, and payment of the remaining 50% of the Arbiter's awards.

Germany agreed to replenish the Special Deposit Account by payments on bonds which it deposited in the Treasury of the United States in a total principal amount of about \$505,000,000 (at par of exchange) with maturities spaced over a period of 52 years (Debt Funding Agreement of June 23, 1930, executed pursuant to the Act of June 5, 1930, 46 Stat. 500, Report of Secretary of

Treasury 1930, pp. 341, 347, 354, 357). Germany has been in default on maturities of these bonds for a period of over five years (R. 43-44).

HISTORY OF THIS LITIGATION

The action was commenced in the United States District Court for the District of Columbia by Z. & F. Assets Realization Corporation against the Secretary of State and the Secretary of the Treasury, to enjoin the certification and payment of the sabotage awards and to have those awards declared void (R. 12).

The Secretary of State certified the awards to the Treasury, after the complaint was filed, but before service of summons on him (R. 311-12). The plaintiff did not apply for a temporary injunction or restraining order.

The Lehigh Valley Railroad Company, on behalf of which a sabotage award had been made to the United States, intervened as a defendant for itself and the other sabotage awardholders (R. 33).

The American-Hawaiian Steamship Company intervened as a co-plaintiff asking the same relief sought by plaintiff (R. 31-32).

Thereupon, the Lehigh Valley Railroad Company moved for summary judgment under Rule 56(c) of the Rules of Civil Procedure, which provides for such a judgment

"if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In support of its motion for summary judgment, the Lehigh Valley Railroad Company relied on the pleadings, and on the records, proceedings and opinions of the Commission and other facts disclosed in the affidavit of Honorable Harold H. Martin (R. 77-112), representative of the United States before the Commission.

The two Secretaries moved for dismissal of the complaint, on the ground that the questions as to the powers of the Commission and the validity of the awards were political questions, and that the decisions of the Mixed Claims Commission were not subject to review in the courts.

The District Court granted both motions, saying:

"In my opinion the court has no power to grant the relief sought by the plaintiff. The claims made before the Commission were the claims of the United States. Whether these claims were properly allowed or not was a question to be raised by the United States and not by individuals who might be wronged by the action of the Commission. If there was any breach of the treaty between the two governments the only recourse would be by action of the contracting parties." (R. 297)

The plaintiffs then appealed to the United States Court of Appeals for the District, where the judgment was affirmed, on the ground that the judicial branch will not interfere in political matters, and that the questions raised by these petitioners as to the powers of the Commission and the validity of the awards were matters of foreign relations within the exclusive province of the executive branch, on which, in a diplomatic dispute with Germany, the Secretary of State already had taken a definite stand.

In both the District Court and the Court of Appeals the Lehigh Valley Railroad, in addition to urging the point

considered by the courts below, made all the points presented in this brief.

STATEMENT

The Knox-Porter Resolution of July 2, 1921 (42 Stat. 105), having directed the retention of seized German property by the United States until Germany made suitable provision for the satisfaction of claims of United States nationals against Germany arising out of or in consequence of the war, and the same provision having been incorporated in the Treaty of Berlin (August 25, 1921; 42 Stat. 1939), the two Governments, on August 10, 1922, signed an agreement (42 Stat. 2200; R. 15-18) establishing the Mixed Claims Commission, to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty of August 25, 1921.

The establishment of that Commission was an essential part of the "suitable provision" to be made by Germany, as a condition to the return of property of German nationals in the possession of the United States.

The Commission was organized, and among the claims filed with the Commission by the United States were the so-called "sabotage" claims, here involved, arising out of the destruction of property by fires and explosions in July, 1916, at the Black Tom terminal in New York Harbor, and at Kingsland, New Jersey, in January, 1917 (R. 82-83). These claims were filed in 1927. On October 16, 1930, the Commission dismissed the claims, finding that Germany had authorized sabotage in the United States, but that the United States had failed to prove that Germany had caused the destructions at Black Tom and Kingsland (R. 82, 260, *et seq.*).

Petitions for rehearing in 1931

A petition for a rehearing of the claims was denied March 30, 1931 (R. 85). On July 1, 1931, the United States filed a supplemental petition on the ground of newly discovered evidence (R. 86). After disagreement between the Commissioners, who had participated in the 1930 decision, the Umpire denied that petition on December 3, 1932 (R. 138). (The decision of December 3, 1932, was set aside June 3, 1936 by *unanimous* vote of the Commission, the Umpire in his opinion stating that he had been misled by false charges that the United States had suppressed important evidence (R. 138-140).)

In dealing with those two petitions the Commission did not find it necessary to pass on its power to reopen.

At the hearing of the supplemental petition for rehearing in 1932 the American Agent said:

"I am not sure what the attitude of Germany may be in reference to the jurisdictional question. I am not certain whether it is the attitude of Germany that it will not submit to this Commission jurisdictional questions for its consideration and determination. If that be the attitude of Germany, I think we should know it at the very beginning. I think we should have known it a year and a half ago. If that be the attitude of Germany, then all that has occurred during the past year and a half has been useless. If Germany takes the position that this Commission has no right to consider and determine the jurisdictional question, then this whole proceeding for the past year and a half has been little less than a farce."

Thereupon, the following discussion took place:

"The Umpire. What I understood and what we all understood the German Agent to suggest was that he presents to this Commission the proposition that its construction of the treaty should be that it has no power now to rehear this case. I did not understand him to take the position that the Commission could not consider the question of its own jurisdiction. If he desires to clear that question, he may do so.

The German Agent. The understanding of the Commission is entirely correct.

The Umpire. In other words, that is a justiciable question here.

The German Agent. Yes.

The American Agent. I am very glad to have that cleared up at the beginning of the argument."
(R. 87-88)

1933 Petition for rehearing and Commission's decision of December 15, 1933, on power to reopen

A new petition was filed by the United States on May 4, 1933, to reopen the cases, for the reason, then for the first time alleged, that the decisions of 1930 and 1932 had been obtained by Germany by fraud and collusion (R. 115).

The German Commissioner in a letter dated May 5, 1933, to the American Commissioner said

"My Government * * * advises me to bring now the question whether or not our Commission has the right to reopen to a final decision." (Ops. & Decs. 1933-1939, Appendix p. VII)

Conflicting opinions were expressed by the two Commissioners as to the power of the Commission to entertain petitions for rehearings, and Germany advised the Secretary of State that in its view the Commission was without

power to entertain a petition to reopen (R. 124). The Secretary of State then stated:

"It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself." (R. 123)

On December 15, 1933, the Umpire, Mr. Justice Roberts, held that the Commission had power to reopen the cases and either confirm the decisions theretofore made or alter them as justice and right might require (R. 45-59).

Result of 1933 decision

The two governments acted upon that decision, and from time to time filed much additional evidence (R. 95, 96, 157-58). The cases have been as actively litigated since 1933 as before, if not more so, except for an interval of about one year in 1936-37 when proceedings were suspended at Germany's request to enable her to negotiate for a settlement.* By an exchange of notes in May, 1934, the two Governments agreed that all cases pending before the Commission had been disposed of, except the sabotage cases and one other claim (R. 185-37).

The German Agent was given opportunity by a special order of the Commission of December 1, 1937, to file any evidence he desired, a privilege which he exercised (R. 157-58). Regardless of any protests Germany had made or rights it attempted to reserve, it continued for six years to litigate the question of fact as to whether the 1930 decision was obtained by fraud.

*An agreement of settlement was signed at Munich, but was not carried out as Germany repudiated it by refusing to present it to the Commission (R. 96).

That Germany recognized that the decision of December 15, 1933, upholding the power to reopen was controlling, unless the Commission vacated it, is evidenced by the following statement in the brief of the German Agent filed November 16, 1938:

"Should the request of the American Agent to pass upon the merits of the claims be construed as a request to reverse the decisions of July 29, 1935, and June 3rd, 1936 (the latter insofar as it confines the litigation to the issue of fraud), the German Agent wishes to state, that in that case he will request the Commission to review its decision of December 15, 1933 concerning the question of jurisdiction to entertain a petition for rehearing in a case finally decided." (R. 97)

Commission's rules and orders respecting procedure

The sabotage claims were the subject of several special rules of procedure issued, and from time to time modified, by the Commission. Special rules declared that the Umpire would sit with the Commissioners in the hearings (R. 84-86). The propriety of that procedure was later questioned by the American Agent and was sustained by the Commission (R. 85-86). An early rule adopted by the Commission on February 14, 1924, requiring a certificate of disagreement to be signed by both Commissioners, (R. 51) was held in the decision of the Commission of December 15, 1933, to have been adopted merely for the convenience of the Commission and not to be essential if there was in fact a disagreement (R. 51-52, see also R. 126-27). The Agreement of August 10, 1922, contains no requirement for such a certificate.

In 1935 the American Agent filed a motion for an order to fix the procedure so that the question of reopening and

the question of Germany's responsibility be argued and decided together, urging that the evidence bore on both and that they were inseparable. Germany objected, and on July 29, 1935, the Commission entered an order denying the motion (R. 144), which it reiterated June 3, 1936 (R. 140).

The Commission's decision of June 3, 1936.

In May, 1936, the cases again came before the Commission on the petition to reopen for fraud, and were fully argued on the facts, the oral argument extending from May 12th to May 28th (R. 95).

On June 3, 1936, the Commission rendered a *unanimous* decision (R. 138-40) setting aside its decision of December 3, 1932 (described *supra*, p. 13). The 1936 decision was on the ground that in rendering the decision of 1932 the Umpire (who had cast the deciding vote for Germany) had been misled by false charges that the United States had suppressed important evidence (Decisions & Opinions of Commission from 1926 to 1932, pp. 1015, 1016, 1028). The 1936 decision, however, postponed action on the question of setting aside the decision of 1930.

The 1939 hearing.

Much additional evidence having been filed by both Governments, the Commission, in January, 1939, with the German Commissioner sitting, heard argument for a period of twelve days (R. 96). Voluminous briefs had been filed by both Governments covering the whole field of evidence. In his brief filed September 13, 1938, the American Agent renewed his request that the Commission make "one bite" of the case, and that, if it set aside the 1930 decision, it

simultaneously pass on Germany's responsibility for the destructions. He there said:

"The respective governments have spent years in the collection of evidence without any restriction on its nature and almost without limitation as to the time afforded to file it. Since the 1936 hearing the German Agent has been permitted to file, and has filed, evidence without regard to whether it related to the so-called fraud issue or to the cases on the merits—a distinction which, for all practical purposes, has long since disappeared. By reason of the fact that it has been a requisite part of the American Agent's case to prove that the Commission has been misled on material issues by false evidence, the very proof which has been introduced to support the pending motions necessarily affects the merits of the cases. The Hermann message, for example, alone establishes the responsibility of Germany; other contemporaneous documents which lead to the responsibility of Germany for the destructions simultaneously prove the falsity of the entire German defense.

Further argument on the merits would, therefore, be only a form and would constitute a source of delay not warranted by any considerations of justice to the parties.

The American Agent, therefore, requests the Commission not only to set aside but to reverse the Hamburg decision and thus render a final decision in favor of the United States in both cases."
(R. 97)

The American Agent made the same request at the oral argument (R. 97), referring to the fact that the German Agent had discussed the merits (R. 98).

At the close of the 1939 hearing the following questions were before the Commission awaiting decision:

1. The question whether the decision of 1930, against the United States, had been obtained by fraud on the part of Germany.

2. The question whether the American Agent's demand that the Commission proceed at once to decide the "merits"—Germany's responsibility for the sabotage—should be granted.

3. The question whether, *on the entire record as it stood*, the United States had established Germany's responsibility. That issue was raised by the argument of the German Agent on the theory that it would be futile to reopen, if the United States could not gain awards, and a finding on the point was insisted upon by the German Commissioner. It is so stated in the opinion of the Umpire (R. 60), in the opinion of the American Commissioner (R. 158-59, 177-78), and in the letter of March 3, 1939, from the German Commissioner to the American Commissioner (R. 290).

4. The question of the nationality of Agency of Canadian Car & Foundry Company, which was covered in briefs filed by each side prior to the 1939 argument (R. 183).

The only question not argued was as to the amount of damages. The evidence for the United States on that subject had been filed long before (R. 108). Germany had offered no evidence on the subject. The only stipulation regarding damages deferred consideration of certain questions as to the *measure* of damages until the question of liability was settled (R. 84).

Retirement of the German Commissioner

At the close of the hearings January 27, 1939, the Commission began its conferences (R. 98, 158). In the deliberations which followed, the Umpire and American Commissioner each stated that in his opinion the decision of 1930 had been obtained by fraud on the part of Germany (R. 60, 102, 158-59).

Thereupon, at the specific request of the German Commissioner, the Commission considered whether, upon the whole record, the United States had established the fact of Germany's responsibility for the explosions (*id.*). After this point had been the subject of discussion, the German Commissioner "retired" on March 1, 1939. That he did so because he found that the American Commissioner and the Umpire were definitely against him, and in order to frustrate the proceedings and prevent a decision adverse to Germany, and that his retirement for that purpose was brought about by his Government, is made clear by the record (R. 60, 102, 145-54, 159, 217). The petitioners have never argued to the contrary.

Both the Commission and the State Department were officially notified of his retirement (R. 100-01, 145, 150). The Commission notified the German Agent that a further meeting would be held (R. 99) June 15, 1939. Following that notice, and prior to the meeting, Germany stated, through announcements made to the Commission by the German Agent and to the Secretary of State by Germany's diplomatic representatives, that Germany would not appear at the meeting and that the withdrawal of the German Commissioner deprived the Commission of power to act (R. 152-54).

The German Embassy's letter follows (R. 153-54):

“(Translation)”

German Embassy

Washington, D. C.,
June 10, 1939.

Mr. Secretary of State:

I have the honor to advise Your Excellency of the following:

As the German Agent on the German-American Mixed Commission reports, a written notice from the American Secretary of the Commission, according to which the Commission will hold a meeting at 11 a. m. on June 15th in the large conference room of the United States Supreme Court Building, was received by him on June 7th of this year.

By direction of my Government, I call attention to the fact that since the withdrawal of the German Commissioner, Dr. Victor Huecking, on March 1st of this year, of which I notified the American Government by a note to Your Excellency of March 24th of this year, the Commission has been incompetent to make decisions and that consequently there is no legal basis for a meeting of the Commission at this stage. By direction of my Government, I advise you that the Government of the Reich will ignore the decision to call the meeting on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure.

Accept, Mr. Secretary of State, the renewed assurance of my most distinguished consideration.

THOMSEN.

His Excellency

Mr. Cordell Hull,

Secretary of State of the United States,
Washington, D. C.”

The German Agent's letter to the Commission follows
(R. 152):

"1439 Mass. Ave., N.W.
Washington, D. C.
June 10, 1939.

Mixed Claims Commission
United States and Germany
German Agency
Mr. Walter R. Dorsey,
American Joint Secretary,
Mixed Claims Commission,
United States and Germany,
Washington, D. C.
Dear Mr. Dorsey:—

With reference to the 'Notice of meeting', dated June 7, 1939, in which you inform me by direction of the American Commissioner that 'a meeting of the Mixed Claims Commission, United States and Germany, will be held on Thursday, June 15th, 1939, at 11:00 o'clock a. m., in the large conference room of the United States Supreme Court Building,' I hereby advise you that in view of the note addressed by my Government to the Department of State today, I shall not appear at the meeting.

Very truly yours,

(s) RICHARD PAULIG,
German Agent."

Proceedings of the Commission June 15, 1939

The Commission met on the date specified in the notice. The letters quoted above and correspondence between the German Commissioner and the Umpire and American Commissioner relating to the German Commissioner's retirement were placed in the record (R. 100, 101). The

American Commissioner, the Honorable Christopher B. Garnett, filed a thorough opinion* in which he found:

(1) That the Commission was competent to act, notwithstanding the retirement of the German Commissioner, which was for the purpose of frustrating the proceedings (R. 165-179);

(2) That the decision of 1930, dismissing the cases, had been obtained by fraud and suppression committed by Germany and should be set aside;

(3) That on the entire record the responsibility of Germany for the explosions had been established.

In connection with this last finding he called attention to the fact that both the German Agent and German Commissioner had invited this finding, on the ground that it would be futile to set the 1930 decision aside if it appeared that the United States could not eventually win. The American Commissioner said:

"In the course of these conferences, the American Commissioner expressed to the Umpire and to the German Commissioner his opinion that the decision at Hamburg** had been reached on false and fraudulent evidence and that the proof of fraud was sufficient to set aside the Hamburg decision and reopen the cases.

After the conferences had continued for a considerable time, the Umpire expressed himself in en-

*Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims Handed Down June 15, 1939 and October 30, 1939 (U. S. Gov't Print. Off., 1940), p. 1.

**Its 1930 decision is sometimes referred to by the Commission as "the Hamburg decision."

tire agreement with the American Commissioner on the question of fraud. Thereupon the German Commissioner argued that, if, upon an examination of the whole record, both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, it would be necessary to dismiss the petition, and he urged upon the Umpire and the American Commissioner the necessity of considering the whole evidence for that purpose.

It was thereupon agreed that the whole record should be examined to determine whether the American case had been proven or not, and it was while the Commission was engaged in examining this question that the letters aforesaid of the German Commissioner were received." (R. 158-59)

That statement is confirmed by the German Commissioner's letter of March 3, 1939, to the American Commissioner, in which, pretending that he, the German Commissioner, was still "open minded" when he resigned and had not "disagreed", he said:

"I surely reserved any decision of mine with respect to the question as to whether the cases should be reopened or not. This was a necessary consequence of the point of view held by all three of us, viz. that there could be no reopening, if the new decision on the old and new evidence taken together should be identical in tenor with the Hamburg-Decision." (R. 290)

The Umpire at the session of June 15, 1939 delivered an opinion concurring in the views of the American Commissioner (R. 59-62). Respecting the Commissioner's action and his own in considering whether and finding that

on the record as it stood Germany's responsibility for the explosions was proved, the Umpire said:

—“4. As set forth in the American Commissioner's opinion, he and the Umpire agreed in the conclusion that the motion should be granted because the United States had proved its allegation that fraud in the evidence presented by Germany misled the Commission and affected its decision in favor of Germany. The German Commissioner was apprised of this conclusion before he withdrew from the deliberations of the Commission. He insisted, nevertheless, that before the motion should be granted, the Commission should examine the proofs tendered by the United States, to determine whether the claims had been made good. This was on the ground that, though the Commission had been misled by false and fraudulent testimony, that fact would be immaterial if, as an independent consideration, the United States had in its own cases failed to sustain the burden of proof incumbent upon it. The American Commissioner and the Umpire thereupon agreed to go beyond what they thought the necessary function of the Commission in the circumstances and proceed to canvass with the German Commissioner the cases as made by the United States. During the course of this investigation the German Commissioner withdrew.”
(R. 60-61)

In conclusion he stated:

“7. I find that, for the reason alleged by the United States in its petitions for rehearing,—material fraud in the proofs presented by Germany, and for the further reason that on the record as it now stands the claimants' cases are made out, the pending motions should be and they are granted.”
(R. 62)

The motions referred to were motions to reopen. Although the point urged in the brief and oral argument of the American Agent, that the Commission should finally decide the merits, was before the Commission, and the Commission might well have rendered a final decision on the merits,* its first order of June 15, 1939, did not go that far. It merely set the former decision aside, and made the finding of fact that, *on the entire record as it stood*, Germany's liability had been proved. This left the case so that it was still open to Germany to ask for a further hearing on the question of liability and to supplement the record as it stood, by further evidence; but Germany had declared that she would not again appear or take any part in the proceedings, and in view of the finding on the record as it stood, a further hearing on the same record was futile.

Thereupon, after the opinions of June 15, 1939, had been rendered, the American Agent arose and said:

"If your Honors please, in view of the attitude of Germany, as expressed in the communications between the German Commissioner and the Umpire and the American Commissioner and the communication between the German Embassy and the Secretary of State of the United States, it is apparent

*The claimed distinction between the issues of German fraud and German liability had become unreal (R. 97-98). The same evidence was relevant to both. For example, one of the important questions exhaustively litigated in the so-called fraud issue was the authenticity of a certain secret message which the Commission found to be authentic in its June 15, 1939, opinion (R. 61-62). As the Commission had repeatedly stated, that message alone, if authentic, was conclusive of Germany's liability (R. 120, 61).

that Germany does not intend to take any further part in the proceedings before this Commission, and seeks to avoid a final conclusion, and frustrate the work of the Commission. I therefore move at this time, if your Honors please, upon the record as it now stands, that awards be entered in accordance with the opinions which have been rendered today (R. 105-06).

The Commission granted said motion and on the same day duly entered an order upon the minutes of the Commission, reading as follows:

"1. The decision of October 16, 1930, reached at Hamburg be, and the same is hereby, set aside, revoked and annulled.

2. The Commission finds, on the record as it now stands, that the liability of Germany in both the Black Tom and Kingsland cases has been established.

3. It appearing from the communications, each dated June 10, 1939, one from the German Agent to the Commission, and the other from the German Embassy to the Secretary of State, that Germany does not intend to exercise her right to take further part in the proceedings of the Commission, and that on the findings made and opinions handed down this day by the Commission, and from what appears in the record, awards should now be rendered to the United States on behalf of claimants; the American Agent is directed to prepare and submit to the Commission for its approval awards in each of the pending sabotage claims. These awards will be considered at a further meeting of the Commission to be called on notice, and appropriate action thereon will then be taken." (R. 106)

The Commission adjourned subject to call, postponing to the later meeting its opinion on the nationality question

involved in the case of Agency of Canadian Car & Foundry Company, and the fixing of the damages.

Germany was apprised of the action taken June 15, 1939 (R. 106, 197, 198).

The later meeting was called for October 30, 1939, and due notice of it was given the German Agent (R. 106-7).

Meanwhile, on October 3, 1939, the German Embassy sent another* letter to the Secretary of State with a request that copies be forwarded to the Commission, which was done (R. 195-216). In it Germany asserted again her position

1. That the retirement of the German Commissioner deprived the Commission of power to function.

2. That an award to the United States on behalf of the Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, should not be granted because not within the scope of the Agreement of August 10, 1922.

3. That decisions of the Commission to the contrary on these points are or would be void.

Germany's letter also charges other irregularities in the proceedings and complains of the Umpire, by alleging he was so fixed in his opinion of Germany's fraud and guilt in causing the explosions, that he was not receptive to arguments of the German Commissioner. Those statements serve to emphasize that the Americans on the one hand and the German Commissioner on the other had definite and declared opposed views, constituting a disagreement in fact,

*See also Germany's July, 1939, protest to the State Department to the same effect (R. 291-94).

and that the reason for the German's retirement was to prevent a decision adverse to his Government.

The Secretary of State, adhering to his view that all the questions, including those of power, were for the Commission to settle, said in his reply to Germany of October 18, 1939:

"I must refrain from engaging a discussion of the various complaints and protests set out in your communication and content myself by stating that since the Department is without jurisdiction over the Commission I consider that it would be highly inappropriate for it to intervene directly or indirectly in the work of the Commission or to endeavor, in the slightest manner, to determine the course of its proceedings."

I have entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite your severe and, I believe, entirely unwarranted criticisms, and I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion." (R. 217)

Proceedings of the Commission October 30, 1939

At the Commission's meeting of October 30, 1939, of which Germany had due notice, Germany again failed to appear.

At that meeting the American Commissioner and Umpire filed opinions holding that the Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, was an American national and that its claim was cognizable under the terms of the Agreement of August 10, 1922 (R.

30, 182-195), a question covered by briefs filed in 1937 and 1939 (R. 183), and under submission, as the Umpire pointed out in his opinion (R. 195).

The awards were then entered.

In the brief of Z. & F. Assets Realization Corporation, it is said (p. 6):

"The alleged awards were made without any testimony being taken as to the extent of the damages. The fixing of the amount of the damages was *ex parte*."

And on page 15:

"the American Umpire after *alleged* conferences with the American Commissioner, without counter evidence submitted by the German Government, and *without notice to it* determined the amount of damages". (Italics ours.)

That brief is replete with inaccurate or incomplete statements of the facts of this case and the facts involved in cited decisions, of which the foregoing is an example, and it has the added vice that it questions the veracity of the Umpire and American Commissioner.

Voluminous evidence for the United States on the question of damages had been filed years previously and copies then furnished to the German Agent (R. 41, 108). Between the meetings of June 15 and October 30, 1939, that evidence was carefully examined by the Commission, and the record of the meeting of October 30 contains the following statements by the American Commissioner and the Umpire:

"The American Commissioner: In accordance with the orders entered on June 15, 1939, the American Agent and the Acting American Agent pre-

pared and submitted to the Commission for its approval memoranda relating to all the pending sabotage claims and the awards to be entered.

Some of the questions which have arisen in the study of these cases are of a legal character, in which I have furnished the Umpire memoranda of the Acting American Agent and memoranda prepared by me relating thereto.

I have thoroughly examined the files for the purpose of determining the correct measure of damages in all of these cases, and have furnished the Umpire memoranda relating thereto. I have also furnished him a memorandum prepared by the Acting American Agent relating to the question of damages.

Wherever the files disclosed as (*sic*) a question of fact or of law was raised, I have discussed it with the Umpire personally. I have presented to him for his consideration an award in each of the 153 sabotage cases.

The Umpire, thereupon, at the same meeting said:

The Umpire: After a study of the data and the records and the memoranda prepared, I have found that the awards are, in my judgment, accurately and properly calculated, and have joined the American Commissioner in signing the awards. They will be accordingly filed in the records of the Commission."
(R. 107)

The affidavit of Honorable Harold H. Martin, Acting American Agent, states:

"Extensive proofs of damages suffered by the sabotage claimants were in the record at the time of the retirement of the German Commissioner consisting of material contained in the Memorials of the respective claimants and evidence in voluninous ex-

hibits filed with the Commission over a period extending from approximately March, 1927, to November, 1936. Copies of all such Memorials and exhibits, according to the practice of the Commission were furnished to the German Agent on or about the date of the respective filing dates of such Memorials and exhibits. No evidence respecting damages was submitted to the Commission subsequent to November, 1936." (R. 108)

The evidence on damages was carefully sifted and the awards were some \$2,000,000 less than the claims presented by the United States (R. 82, 63-73).

As to notice, the order of June 15, 1939, notified Germany that the Commission would proceed to fix the damages and hold a later meeting to settle them. Due notice of that later meeting was given the German Agent (R. 106-107) and Germany was aware of the purpose of the meeting (R. 197-98, 213, 215).

Germany had an opportunity at the meeting of June 15, 1939, or even at the meeting of October 30, 1939, or at any time during the interval, to introduce evidence on damages. At any time between those dates she could have participated in the computation of damages, and at the meeting of October 30, 1939, it was still open to her to appear and be heard as to the amount.

Instead she chose to remain away.

Upon their entry the awards were presented to the Secretary of State. All the attacks on the Commission's action were by that time an old story to the State Department. The attacks had previously been brought to its attention by the German Embassy, had been considered and rejected before the awards were entered. The awards were therefore certified to the Treasury for payment (R. 110, 312, 318).

SUMMARY OF ARGUMENT

I. The validity of the awards is not open to inquiry in the Courts and the case does not present a justiciable controversy, because:

1. The question of validity is the subject of a dispute between the two Governments, involving the powers of the Commission and the interpretation of an international compact, to which they are parties. The question is a political one, to determine it involves interference in foreign relations, which are exclusively within the province of the Executive Department; and

2. The Mixed Claims Commission is an international tribunal, whose decisions, including those on its own jurisdiction, are not open to review in our domestic courts. Furthermore, its decisions as to its own jurisdiction are *res judicata* as between the two Governments, and as to petitioners, whose only interest is derived from the United States.

II. If the Court does inquire into the validity of the awards, they should be sustained, because:

1. The Commission had power to grant a rehearing, and vacate an earlier decision, on the ground that it had been obtained by fraud.

That is a power inherent in every such tribunal while it continues to sit. The provision in the Agreement of August 10, 1922, that the Commission's decisions should be "final and binding on the two governments" excludes a review by any other court or in any other place, but does not forbid the Commission to reconsider its own decisions.

2. The withdrawal by Germany of her Commissioner, after the cases were before the Commission for decision, for the purpose of frustrating the proceedings and preventing a decision against her, was ineffective to prevent the two remaining members from proceeding with and disposing of the case.

Before the German Commissioner retired, all questions in litigation had been argued and submitted, except that of the measure of damages.

Moreover, Germany could not have frustrated the proceedings by withdrawal of her Commissioner at any stage. Restoration of seized German property had been made in reliance on her proceeding in good faith to complete the arbitration.

3. The Agency of Canadian Car & Foundry Company, a New York corporation, was an American national, under the terms of the Agreement of August 10, 1922, and the claim presented by the United States on account of the destruction of its property was properly cognizable by the Commission.

The question of nationality was involved in every claim considered by the Commission, and was one of the questions it was expected to decide.

III. The miscellaneous contentions of the petitioners are wholly without merit.

ARGUMENT

I

THE VALIDITY OF THE AWARDS IS NOT OPEN TO INQUIRY IN THE COURTS AND THE CASE DOES NOT PRESENT A JUSTICIABLE CONTROVERSY.

1. The question of the validity of the awards, involving as it does a dispute between the two Governments about the jurisdiction and powers of the Commission and the interpretation and effect of an international compact between the United States and Germany, is a political matter involving foreign relations, in which, under our Constitution, the Judicial Department may not interfere.

This point is ably and exhaustively treated in the opinion of Justice Miller in the Court of Appeals.

That the dispute over the action of the Commission is a matter involving foreign relations, is clear.

The Agreement of August 10, 1922, is an international compact, to which only the two governments are parties. The Mixed Claims Commission is an international tribunal created by two sovereign nations to determine

"the amount to be paid by Germany in satisfaction of Germany's financial obligations"

under the Treaty of Berlin, in a litigation to be conducted before it by the two governments. Its awards are awards in favor of the United States. The only parties before the Commission are the two governments (R. 81-82). *Frelinghuysen v. Key*, 110 U. S. 63, 71, 72; *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 458; *United States v. Dieckelman*, 92 U. S. 520, 524. The wrong for which the

United States sought redress was an injury to its sovereignty by wrongful acts committed by Germany. Although the damages may be measured by the losses of its citizens, the citizens do not receive the proceeds of an award by virtue of the international agreement. Their interests are derived from an Act of Congress. In the absence of such legislation there may be a moral obligation of the Government to hand the proceeds of an award over to the citizens who suffered the loss, but it is under no legal obligation to do so. *Williams v. Heard*, 140 U. S. 529, 537; *Boynton v. Blaine*, 139 U. S. 306, 323.

In *Williams v. Heard*, *supra*, considering the Colombian claims, the Court said:

"It was held in *United States v. Weld*, 127 U. S. 51, that this award was made to the United States as a nation. The fund was, at all events, a national fund to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund. * * * There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value."

As Secretary of State Frelinghuysen said with reference to another international arbitral tribunal adjudicating claims similar to those on which the sabotage awards are based:

"The Commission is not a judicial tribunal adjudging private rights but an international tribunal adjudging national rights." (Moore; VI Digest Int. Law, § 1055, pp. 1015-6.)

See also *Mavormattis* case, Permanent Court of International Justice, 1 Hudson, World Court Reports, pp. 302, 337-38; *United States ex rel. Angarica v. Bayard*, 127 U. S. 251, 259 (1888); *U. S. v. Diekelman*, 92 U. S. 520, 524 (1875); Distribution of Alsop Award by the Secretary of State, Opinion of the Solicitor for the Department of State, J. Reuben Clark, Jr., Aug. 14, 1912 (Wash. Govt. Printing Office, 1912) page 14.

The "national" aspect of the claims presented to the Mixed Claims Commission has been emphasized by the Commission and the courts. *Administrative Decision No. II*, Mixed Claims Commission Decs. & Ops. p. 8 (R. 81-82); *Standard Marine Insurance Co. v. Westchester Fire Insurance Co.*, 19 F. Supp. 334, at page 338 (S. D. N. Y. 1937), aff'd 93 F. (2d) 286 (C. C. A. 2d, 1937), cert. den. 303 U. S. 661.

Both lower courts here recognized this essential nature of the claims:

"The claims made before the Commission were the claims of the United States." (District Court—R. 297)

"That tribunal dealt only with the two governments, had no relations with claimants, and could

take cognizance only of claims presented by or through the respective governments. * * * While claims of individual citizens presented by their respective governments were to be considered by the Commission in determining amounts, the whole purpose of the agreement was to ascertain how much was due from one government to the other on account of the demands of their respective citizens." (Court of Appeals—R. 349-50)

In this case there is not merely a potential but an actual controversy between the two governments. As the opinion below points out, every ground of attack by petitioners on the validity of these awards has been urged by Germany, through its Embassy, to the Secretary of State, and the latter has taken a definite position on them, rejecting them all. Whether his reason for rejecting them was because the Commission had decided them and he considered its decisions to be within its powers and binding, or whether he had formed his own opinion on the points, is of no more than secondary importance. (The Secretary's letter—R. 217—about the attempt of Germany to frustrate, shows he had very decided views of his own about that.) The diplomatic dispute still remains. For the courts of the United States to sustain any one of the claims of petitioners, would be to place the courts in direct conflict with the Executive Department in an active dispute between the two governments as to the interpretation of an agreement between them, and over the powers of a commission established by them to determine the right of one government to redress from the other. It would result in the courts rejecting an award in favor of the United States which the Executive Department has accepted and insists on executing.

Petitioners' position can not be stated without disclosing the interference in foreign affairs involved in the relief they ask. In their own words (Brief in No. 381, p. 28):

"It is plain that, in the present instance, neither the *proper* and *lawful* conduct of our foreign affairs, nor the proper and lawful conduct of our domestic affairs, would in any way be impeded by a judicial determination that the so-called awards now in question was the result either of a mistaken view of the law or the facts, or of a usurpation of power.

"Such a determination would in no way embarrass the Executive in securing a *proper* determination, by arbitration or otherwise, of the sabotage claims; * * *" [Italics ours]

In other words, petitioners ask this Court to pass on the *propriety* of the conduct of our foreign relations by the executive Branch. The sequel to this case, as petitioners visualize it, would find the United States forced to re-negotiate the claims for German sabotage occurring twenty-four years ago—to re-negotiate them with a country which is in default on the bonds it pledged in 1930 to secure payment of those and other claims and which has sought by continued irregular devices to frustrate any adverse arbitral determination of the sabotage claims. Such negotiation failing, the choice of this country would be either resort to war or the abandonment of the claims. No case of a more direct interference in foreign relations can be imagined than that which the petitioners ask this Court to undertake.

"Political" questions, and particularly political questions which concern the conduct of this country's foreign relations, have been held by this Court throughout its history to be non-justiciable. Early pronouncements of the doc-

trine are found in *Ware v. Hylton*, 3 Dall. (U. S.) 199, 260 (1796), and *Foster v. Neilson*, 2 Pet. 253, 307 (1829). The most recent case is *Coleman v. Miller*, 307 U. S. 433, at 454-55, 457 (1939). In the intervening period the same doctrine has often been enunciated.*

The same principle of judicial non-interference in the field of foreign affairs has been consistently followed in England since the early days. See *Rustomjee v. The Queen*, [1876-77] 2 Q. B. D. 69, at 74 (which also involved moneys collected by a sovereign for her subjects); and *West Rand Central Gold Mining Company, Ltd. v. The King* [1905] 2 K. B. 391.

Petitioners' argument (No. 381, Pt. I) on this score is that courts will determine political questions where "private rights" are involved. Although the boundaries of the field of political questions have not been very clearly defined, in no case has this Court ever interfered in the conduct of foreign relations irrespective of what so-called "private rights" were affected by executive action in that sphere.

Where interference with this country's conduct of foreign affairs will result from the adjudication of "private rights", the domestic courts decline to act. "If this were

*See *Doe v. Braden*, 16 How. (U. S.) 635 (1853); *U. S. v. Lee*, 106 U. S. 196, 209 (1882); *Head Money Cases*, 112 U. S. 580, 598-99 (1884); *Whitney v. Robertson*, 124 U. S. 190, 193-5 (1888); *Botiller v. Dominguez*, 130 U. S. 238, 247 (1889); *Jones v. United States*, 137 U. S. 202, 212 (1890); *Terlinden v. Ames*, 184 U. S. 270 (1902); *Wilson v. Shaw*, 204 U. S. 24, 32 (1907); *Charlton v. Kelly*, 229 U. S. 447 (1913); *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302 (1918); *Lehigh Val. R. R. Co. v. Russia*, 21 F. (2d) 396, 399-400 (C. C. A. 2d, 1927), cert. den. 275 U. S. 571; *George E. Warren Corporation v. United States*, 94 F. (2d) 597 (C. C. A. 2d, 1938), cert. den. 304 U. S. 572.

not the rule, cases might often arise, in which on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial department. * * * No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.”*

The petitioners point out that treaties are often interpreted by the courts in litigation to which private persons are parties.

Treaties may have two aspects. They are always international compacts. If they purport to establish rights or liabilities of individuals, and are self-executing, they may, under our Constitution (Art. VI) have the force of domestic law and be applied as such. Extradition treaties, treaties giving aliens the right to own property, or receive it by inheritance, are of the latter type, and every case cited by the petitioners on this point was of that nature. But even in the interpretation of extradition treaties questions of foreign relations within the State Department's domain are held to be non-justiciable. *Terlinden v. Ames*, 184 U. S. 270 (1902) and *Charlton v. Kelly*, 229 U. S. 447 (1913).

The line of demarcation between treaty questions which are justiciable and those which are not was well stated by this Court in *Head Money Cases*, 112 U. S. 580, at 598-599:

“A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail,

**Williams v. Suffolk Insurance Co.*, 13 Pet. (U. S.) 415, 420 (1839).

its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

And in *Foster v. Neilson*, 2 Pet. (U. S.) 253, 314, Chief Justice Marshall said:

"Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legis-

lature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; * * *,”

The Agreement of August 10, 1922, does not purport to establish private rights. Whatever interest the petitioners have in the awards granted to the United States on account of their losses or in the money in the Treasury available for their payment, is derived not from the agreement establishing the Commission, but from an act of the Congress. *Williams v. Heard*, 140 U. S. 529, 537.

Even in those cases in which this Court has interpreted treaties which did prescribe private rights or liabilities, it has without exception, we believe, refrained from interfering with the State Department in its conduct of foreign affairs.

The text writers, including those who are critical of some aspects of the limitation on justiciable questions, unanimously approve the doctrine that

“the Court must forego its power of interpretation where the executive has created a situation as to which interference, contradiction, even the suggestion of a doubt, may be dangerous or impolitic.” Jaffe, *Judicial Aspects of Foreign Relations*, (Harvard Studies in Administrative Law, 1933) p. 74.

That statement of Jaffe is directly applicable to this case.* As the Court of Appeals held, “there is no reason or

*See also Crandall, *Treaties, Their Making and Enforcement* (Studies in History, Economics and Public Law, Columbia Univ. Vol. 21, No. 1, 1904) page 221; Finkelstein,

excuse for judicial interference. Such interference could result only in embarrassment to the political arm of the government in its conduct of the international affairs of the nation." (R. 349)

The petitioners contend that, although this case does involve foreign relations, it is essentially a controversy between private citizens over the right to a fund in the Treasury, but their entire case is predicated on the claim that the sabotage awards are void. To establish that they ask this Court to interpret the Agreement of August 10, 1922, and hold that the Commission's acts were beyond its powers, and thus dip directly into the existing diplomatic dispute between the two governments.

Petitioners, as they did below, seek support in the line of cases which deal, not with the *validity* of an award, but with *conflicts over asserted rights to receive payment* of an award, arising between original claimants and those claiming under them, or between two or more persons whose rights are derivative and who claim through assignments or transfers—disputes as to the proper persons entitled to the money on payment of a successful claim.*

Judicial Self-Limitation, 37 Harv. L. Rev. 338, at 347 (1924); Weston, *Political Questions*, 38 Harv. L. Rev. 296, 315-16, 327-328 (1925); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 Minn. L. Rev. 485, at 486, 511 (1924); Potter, *The "Political" Question in International Law in the Courts of the United States*, VIII S. W. Political and Social Science Quarterly 127 (1927).

**Orinoco Co. v. Orinoco Iron Co.*, 296 Fed. 965 (App. D. C., 1924), *aff'd sub nom. Mellon v. Orinoco Iron Co.*, 266 U. S. 121 (1924); *Houston v. Ormes*, 252 U. S. 469 (1920); *Comegys v. Vasse*, 1 Peters 193 (1828); *Frevall v. Bache*, 14 Peters 95 (1840); *Judson v. Corcoran*, 17 How. 611

As both courts below pointed out, no such question is involved in this litigation (R. 298, 350-51). The determination of the proper person entitled to the proceeds of a particular award, once the United States has established a claim, presents no complication involving the executive department's action or power in international affairs and is a matter of domestic law for the local courts. This case would be comparable to those cited were petitioners alleging that they, and not the Lehigh Valley Railroad, owned Black Tom terminal when German sabotage agents destroyed it in July, 1916.

Petitioners rely particularly on the *Orinoco Iron Co.* case. A correct statement of that case discloses its utter lack of relevance and illustrates the distinction we have just made.

The plaintiff in that case sought to obtain moneys received by the United States from Venezuela on the theory that it was the real party injured by the expropriations of property for which Venezuela had paid the United States. The Court of Appeals for the District held (and before this Court it was assumed) that the company named in the award was "in the position of a trustee *ex maleficio* as to plaintiff"* (266 U. S. 121, at 125). The Secretary of State had answered plaintiff's claim to the money by advice that the issue of ownership of the claim was for the courts, as

(1855); *Williams v. Heard*, 140 U. S. 529 (1891); *Matter of Westbrook*, 228 App. Div. 549 (N. Y. 1930).

See also *Doerschuck v. Mellon and Z. & F. Assets Realization Corp.*, 55 F. (2d) 741 (App. D. C., 1931); Decisions and Opinions of Commission to 1925, pp. 10, 913.

*The importance of the "trustee *ex maleficio*" relationship in the *Orinoco Iron Co.* case was emphasized in *Smith v. Harrah*, 51 F. (2d) 314 (App. D. C., 1931).

has long been the law (see other cases cited in footnote pp. 44-45, *supra*). The brief of the Secretary of the Treasury to this Court pointed out that *no attempt* had been made by the United States to determine the person entitled to the money.

Nor is petitioners' reliance on *Perkins v. Elg*, 307 U. S. 325 (1939), as a relevant decision justified. In that case the Secretary of State had denied a passport to a citizen of the United States on the incorrect premise that she was not a citizen. No question of interference in foreign relations was involved.

The provisions of the Settlement of War Claims Act of 1928 (*supra*, p. 8) routing awards of the Commission through the State Department for certification to the Treasury, instead of having the awards certified by the Commission to the Treasury, is a legislative recognition of the fact that the subject is one involving our agreements and relations with a foreign government, and gives the Secretary of State the opportunity to hold up an award, if he believed that it did an injustice to Germany, or for any other reason required correction. The Secretary of State had full power to refrain from certifying an award if it should seem open to objection. *Frelinghuysen v. Key*, 110 U. S. 63; *Boynton v. Blaine*, 139 U. S. 306; *La Abra Silver Mining Co. v. U. S.*, 175 U. S. 423.

In the *La Abra* case, jurisdiction to investigate the merits of an award of an international commission had been specifically conferred upon the Court of Claims by an act of Congress. Even there, the argument was advanced that Congress had no power to invest any court with jurisdiction to determine the validity of an international tribunal's award. In determining that the legislation was constitutional, this Court pointed out that the statute was enacted

at the suggestion of the executive branch of the Government, and this Court made it clear that, without legislation, the question of the validity of the awards would have been solely for the executive department, and not for the courts, to determine.

The Constitution wisely placed the power over foreign affairs with the executive. The one check is the advice and consent of the Senate in the making of treaties. And that exception to the "very delicate, plenary and executive power of the President as the sole organ of the federal government in the field of international relations" has always been strictly construed. See *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 319-22 (1936). To add a further veto power in the courts would stultify effective conduct of a most important function of the United States Government.

Petitioner, Z. & F. Assets Realization Corporation, cites *Colombia v. Cauca Company*, 190 U. S. 524, as an instance where this Court held that an international commission had exceeded its powers as to the measure of recovery, but the petitioner fails to explain that the agreement for arbitration in that case was not an international compact (see pages 50-52 Brief in No. 381). That agreement was between the Republic of Colombia and the Cauca Company, a private corporation. The United States brought the parties together, but was not itself a party to the arbitration. There was no dispute between the two Governments as to the award, and the only Government involved voluntarily submitted its case to the courts of the United States.

The court below said:

"The present case is clearly distinguishable, also, from the case of *Colombia v. Cauca Co.*, relied upon

by appellants, in which a foreign government voluntarily submitted to an arbitration between itself and a private citizen of the United States and, thereafter, voluntarily submitted itself to the jurisdiction of a federal court to secure the determination of a controversy between itself and that private citizen, which arose out of the arbitration proceeding." (R. 353)

2. The decisions of the Commission, including those respecting its powers and jurisdiction, are not open to review or collateral attack in the domestic courts.

While closely related to the previous point, this proposition is not precisely the same, because it does not depend on the separation of powers under the Constitution.

As we have seen, the Agreement of August 10, 1922, is not a private contract, but an international compact for adjudication of claims of the United States against Germany. Our domestic courts have not, nor did they have before the Agreement was made, jurisdiction to adjudicate such claims. Germany has never consented to be sued in our courts, and the United States has never consented to have its domestic courts adjudicate its claims against Germany or interfere in any way with their enforcement.

The Commission is a tribunal with exclusive jurisdiction. The Agreement constituting it was made pursuant to a treaty and under authority of law, and has been, in effect, ratified by the Settlement of War Claims Act of 1928, which recognized the Commission and adopted it as part of the machinery for disposing of seized German property. The Agreement itself excludes review, directly or collaterally, by any other tribunal, of the Commission's decisions or awards.

The provision in the Agreement that the decisions of the Commission shall be "final and binding" on the two Governments. (Art. VI, R. 18), though not preventing the Commission, while still sitting, from reconsidering its own rulings, does mean that, when the Commission is through with a case, the matter in dispute shall not be open to further inquiry in any other tribunal or in any other way. If its awards are binding on the two governments, *a fortiori* they are binding as to private citizens whose only interest in attacking them is acquired through or under the United States.

The Settlement of War Claims Act of 1928 does not contemplate that the action of the Commission may be reviewed by a domestic court, before payment.

Nothing in that Act or in any of petitioners' precedents, suggests any right in beneficiaries of awards to inquire into or attack in the courts the validity of other awards.

In *Comegys v. Vasse*, 1 Pet. 193, 211, it is said:

"The object of the treaty was to invest the commission with full power and authority to receive, examine, and decide upon the amount and the validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not reexaminable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction."

Similarly, when Mexico threatened to institute proceedings in the United States Courts attacking certain awards of the United States-Mexican Commission, Secretary of State Evarts, in a letter dated August 4, 1880 to the Mexican Minister respecting awards of the Commission, said:

"I find myself equally unable to regard an assertion of right on the part of Mexico to judicial action in any court or tribunal whatever, in review, in any form, or to any extent or effect, of these awards, or of a right to judicial obstruction to the execution of these awards in favor of the claimants, as otherwise than in distinct contradiction of the whole purpose of the convention as well as of the explicit provision of the fifth article thereof, which absolutely bars any agitation of right affecting the subjects embraced within the terms of the convention" (H. Ex. Doc. 103—48th Congress, First Session, p. 613).

That the Commission *must* pass on questions of interpretation of the Executive Agreement of August 10, 1922, in order to determine its own powers is beyond doubt. Petitioners have not argued to the contrary, although at one point (Brief in No. 381, pp. 67-69) one of them has confused that question with the questions of the Commission's ultimate power raised in this case.

There was some dispute between the two Governments about the Commission's deciding questions of its own jurisdiction. Germany admitted its power at one stage of the proceedings (see *supra*, pages 13-15) and, after raising the question in 1933 with respect to the Commission's decision on its power to reopen the cases, Germany later conformed to the Secretary of State's position and the Commission's decision that it had the power to decide its own jurisdiction, at least to the extent of continuing to litigate the charges of fraud and of treating the 1933 decision as controlling the proceedings (R. 89-90, 52-53, 135-36). With respect to the effect of her Commissioner's withdrawal, Germany's protests were directed to the Commission as well as

the Secretary of State (R. 215-16, 152-54). The Secretary of State again took the unequivocal position that the questions raised were for the Commission as it was then constituted to decide (R. 217). On the third issue of the Commission's power, the nationality question of Agency of Canadian Car & Foundry Company, the dispute as to the propriety of the award was brought before the Commission by the German Agent's motion and both Governments filed briefs on the point with the Commission (R. 109, 182-83, 195).

That an international arbitral tribunal has the power to determine its own jurisdiction has long been accepted in international law. As Lord Chancellor Loughborough said in answer to a similar question raised by the English commissioners in the arbitration under the Jay Treaty of 1794,

*"the doubt respecting the authority of the Commissioners to settle their own jurisdiction was absurd, * * * they must necessarily decide upon cases being within, or without, their competency"—(1. Moore, International Arbitrations, p. 327). (Italics ours.)*

Daniel Webster, Secretary of State at the time of the United States-Mexican Claims Commission, Convention of April 11, 1839, in a letter dated January 21, 1842, to one of the Mexican Commissioners, said:

"The mixed commission under the convention with that republic has always been considered by this government essentially a judicial tribunal, with independent attributes and powers in regard to its peculiar functions. Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction."

as well as to consider and decide upon the merits of the claims which might be laid before it." (S. Ex. Doc. 320, 27 Cong. 2 Sess. 185; 2 Moore, Int. Arb., p. 1242). (*Italics ours.*)*

Likewise, Ralston, in discussing the right of international commissions to pass on their own jurisdiction, states

"That any other conclusion than the one we have indicated would be erroneous we may believe when we reflect that it is impossible for a mixed commission ever to grant or refuse an award without incidentally or inferentially passing upon its right to reach the conclusion attained, and to deny jurisdiction so to do is in point of fact to deny the right to act at all." (Ralston, International Arbitral Law and Procedure, p. 23).

See also Ralston, International Arbitration from Athens to Locarno, p. 103; Lauterpacht, Private Law Sources and Analogies of International Law, p. 208.

The Commission's power to pass on these questions of its own jurisdiction and the *finality* of its decisions on the point were ably dealt with by Umpire Roberts in his decision of December 15, 1933, in which he stated:

"A decision that it had jurisdiction of a claim was by the very terms of the Agreement to be accepted by both Governments as final and binding upon them (Article VI). The Agreement submits the questions for decision as between the two Governments to the Commission. What those questions are must be determined within the four corners of the instrument. It is not within the competency of

*John Bassett Moore refers to this statement of Secretary of State Webster as "a position eminently sound in law and wise in practice" (2 Moore, Int. Arb., p. 1241).

either Government to retract the authority which it conferred upon the Commission. If that body may not from the terms of the Agreement ascertain what power was conferred, it would be wholly incompetent to act except in an advisory capacity, and none of its decisions could in the nature of the case be accepted as final and binding by the Governments, as the Agreement states they shall be. How the Commission shall proceed with its task, the form of pleading to be adopted, the manner of hearing (subject to what is hereafter stated in respect of Article VI), the form and entry of its decisions, its control over a case after a decision is rendered, are all left to its determination and regulation.

"The Agreement is to be read in the light of its language and its purpose; and where it is silent, the powers and duties of the Commission are to be determined according to the nature of the function entrusted to it. I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it. Any other view would lead to the most absurd results—results which obviously the two Governments did not intend." (R. 52-53)

Other international commissions recognize the same principle of finality of jurisdictional decisions.

With reference to a determination of the citizenship of a claimant in the American-Venezuelan arbitration of 1903, the American-Venezuelan Commission stated:

"Hence, the Commission, as the *sole* judge of its jurisdiction must in each case determine for itself the question of such citizenship upon the evidence submitted in that behalf." (*Flutie cases—Ralston*, Report of Venezuelan Arbitration of 1903. (Wash., 1904), pp. 38, 41.) (*Italics ours.*)

Secretary of State Evarts came to the same conclusion with respect to the powers of the American-Spanish Commission under the Convention of February, 1871. In reference to the validity of judgments of naturalization of certain American claimants, the Secretary of State pointed out that the Commission's decisions on the "*reach of the jurisdiction accorded by the convention of 1871*" were final and conclusive on both Governments (3 Moore, International Arbitrations, pp. 2599-2600).*

It is clear that the decisions of this Commission, including those relating to its own powers under the Agreement, are not open to attack in a domestic court, and any assertion by either government that the Commission exceeded its powers can be settled, if at all, by negotiations between the two Governments. Ralston, with reference to the decisions of international arbitral tribunals in excess of their powers, states:

"It is the fact that there is no tribunal capable of determining whether the award of an arbitration is infected with excess of power or essential error, and, save by subsequent agreement, the nations are left to claim as they see fit existence of a wrong of this character. * * *" (Ralston, *International Awards*, 15 Va. L. Rev. 1, 12 (1928)).

*See also *The Betsey*, 4 Moore, International Adjudications (1931), 81, 85, 182, 186; *Hargous (U. S.) v. Mexico* (1839), 2 Moore, International Arbitrations, p. 1267; *Rudloff (U. S.) v. Venezuela*, Ralston, Report of Venez. Arb., pages 182, 185; Greco-Turkish Agreement of December 1, 1926, Permanent Court of International Justice Advisory Opinion No. 16 (August 18, 1928), Public. Ser. B., No. 16, pages 20, 21; and Castberg, *L'Exces de Pouvoir dans la Justice Internationale* (Academie de Droit International, Recueil des Cours, 1931, I, Tome 25) pp. 425-26.

So far as the negotiations between the two Governments are concerned, the United States has upheld the validity of the awards, and that is the end of the matter so far as petitioners and this Court are concerned.

There are additional reasons why questions of jurisdiction arising before the Commission and decided by it (whether rightly or wrongly) are *res judicata*.

In the field of domestic law the question as to whether the jurisdiction of a judicial tribunal may be collaterally examined has recently been clarified.

In *Stoll v. Gottlieb*, 305 U. S. 165 (1938), it was held that where the question of its own jurisdiction over the subject matter was raised before a United States District Court, and the District Court erroneously upheld its own jurisdiction, the determination was *res judicata* between the parties to the action, and the court's judgment was not subject to collateral attack by them. This Court said:

"A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until

passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata*. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely relitigates the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first" (pp. 171-72)

The principle of the *Stoll* case has been reaffirmed in two recent decisions—*Treimies v. Sunshine Mining Co.*, 308 U. S. 66 (1939) and *Chicot County Drainage Dis-*

trict v. Baxter State Bank, 60 S. Ct. 317 (1940). In the latter case, with respect to the argument that a decree of a Federal District Court, acting as a court of bankruptcy under a statute subsequently declared to be invalid, was open to collateral attack, the Court (by Mr. Chief Justice Hughes) said (p. 319):

"We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally."

See, also, *Sunshine Anthracite Coal Co. v. Adkins*, 60 S. Ct. 907 (1940); and 40 Col. L. Rev. 1006 (1940).

Although that principle may not be applicable to an arbitration board created by private contract, it should be applied in this case. The Mixed Claims Commission is an international court, created pursuant to a treaty, under authority of law, and its creation has been ratified by the Settlement of War Claims Act of 1928. It has the characteristics of a court, and there is no reason why the principle of *Stoll v. Gottlieb* should not be applied.

Its decisions are *res judicata* as to the United States; they are equally so as to the petitioners, who have no interest beyond that granted to them by the United States.

II.

IF THE QUESTION AS TO THE VALIDITY OF THE AWARDS IS CONSIDERED, THEIR VALIDITY SHOULD BE UPHELD.

In both courts below this respondent urged this point and contended that the Commission had power to reopen the cases, that after the retirement of the German Commissioner the Umpire and American Commissioner had power to proceed, and that the Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, was an American national, within the terms of the Agreement of August 10, 1922. If in this Court the reason assigned for their decisions by the lower courts should be rejected, any other point, urged below and supported by the record, is available to support the judgment. *Helvering v. Gowran*, 302 U. S. 238, 245 (1937).

1. The Commission had power to set aside its decision of 1930 and reopen the cases.

This question came before the full Commission in 1933, shortly after the filing of the petition for reopening on the ground of fraud, was the subject of disagreement between the two National Commissioners, and was disposed of by a decision of the Umpire, Mr. Justice Roberts, rendered December 15, 1933 (R. 45-59). At that time Germany contended before the Commission that, even if the decision of 1930 in its favor had been obtained by fraud, the Commission, though still functioning, was helpless to act and without power to reopen the cases. The petitioners now make the same claim.

The fraud charged and proved was not merely occasional perjury of witnesses for Germany. The whole defense from the beginning was corrupt and fraudulent, organized by men who were high German officials of the Foreign Office and General Staff in 1916 and 1917, some of whom were still high officials at the time of the trial. It involved wholesale and organized perjury by groups of witnesses, suppression of documentary evidence, spiriting witnesses out of the country, concealing others, preventing the United States from obtaining testimony of witnesses under the dominion of Germany, forcing witnesses under her dominion to recant, and finally, on a very critical question whether the Kingsland fire was incendiary or an industrial accident, purchasing of perjured testimony from a whole group of former Kingsland employees, the filing of that testimony at the last moment before the hearing in 1930, and the submission by Germany to the payment of blackmail, to keep those witnesses in line,—all this organized and led by representatives of the German Government then in charge of the defense (R. 60, 61 and Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims Handed Down June 15, 1939 and October 30, 1939 (U. S. Gov't Print. Off., 1940) pp. 21-156, 177, 308-10). No tribunal having regard for the integrity of international arbitrations, having been misled by such means, and by a mistaken assumption that it could rely on complete good faith on the part of a sovereign government, would allow its decision to stand; and the perpetrator of the fraud to escape justice, on the plea that the fraudulent defense had been uncovered too late.

When the petition of May 4, 1933 was filed, the Commission had not disbanded. It was still functioning and had

a number of claims still to be determined (R. 136-37). The decision of 1930 had not been executed. It was not of a nature which required execution. The position of the two governments had not been changed as a result of it.

The principal argument of Germany against the power to reopen rested on the provision of the Agreement of August 10, 1922, that the decisions of the Commission were to be "final and binding upon the two Governments." (R. 55)

That provision has no relation to the Commission's power to reconsider its own decisions. It was meant solely to bar review by any other tribunal and to bind the two Governments to accept the results of their arbitration, and not to bar them from applying for rehearings by the Commission itself.*

The concluding statement in the Umpire's 1933 opinion on this question is:

"The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been de-

*Counsel for the intervener-petitioner herein, when he was acting as American Commissioner of the General Claims Commission, United States and Mexico, made the same distinction. Although the case before him did not involve the point here in issue, Mr. Nielsen then stated:

"Motions for rehearing have been presented to and entertained by other international tribunals. Such a motion of course in no way involves the repudiation by a Government of a final decision. * * *" (General Claims Commission, United States and Mexico, Opinions of Commissioners, Oct. 1930-July 1931, p. 207 at p. 232.)

frauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

I am of the opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand." (R. 59)

The German Agent in 1932, in response to an explicit question by the Umpire at a hearing on a prior motion for rehearing in these same sabotage cases, agreed that the question as to the power of the Commission to reopen was a justiciable question, for the Commission itself to decide (R. 87-88). (The proceedings at that hearing are set forth fully at pages 13-14 of this brief.)*

*The German Agent in an earlier brief had similarly stated:

"The question whether and under what conditions a claim passed upon by the Commission may be reopened and reconsidered is one of procedure.

The agreement of August 10, 1922, which provides for the creation of the Commission and defines its powers is silent on the subject. It merely provides that the decision of the Commission shall be accepted as 'final and binding upon the two Governments' (Art. VI, par. 3).

It follows from this provision that neither of the two Governments is entitled to a reopening of a case

After the disagreement arose between the two Commissioners respecting the right of the Commission to reopen for fraud, the contention of Germany that the Commission was without power to reopen was brought to the Secretary of State, who wrote the letter (R. 123) stating:

"It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself."

After the Umpire's decision of December 15, 1933, settled the question, for six years the Commission proceeded under that decision and both governments actively litigated the claims by submitting voluminous evidence and participating in extensive arguments (R. 95-98; 157-58).

By exchange of notes in May, 1934, the two governments listed the cases still pending before the Commission, and included the sabotage cases in the list (R. 135-37). In the same exchange of notes, the two Governments, at the request of Germany, likewise agreed to consider as pending before the Commission the *Drier* claim, in which a petition for a further award had been filed and with respect to which Germany desired an opportunity for further investigation of an award previously granted, with a view to having the award reconsidered by the Commission (*id.*).

decided by the Commission as a matter of law. *It is left entirely to the Commission whether and under what conditions it may choose to proceed to the reconsideration of a case once decided.*" (Memorandum Brief in Reply to Motion of the American Agent of January 12, 1931 for a Rehearing, pp. 1 and 2.) (*Italics ours*)

The Commission has repeatedly reopened and corrected its prior decisions in other cases (R. 93-94) and by the decision of June 3, 1936, in these cases, in which the German Commissioner concurred, the Commission set aside its prior decision of December 3, 1932 (R. 138-40).

Petitioner in No. 381 attempts to distinguish this case from other cases in which the Commission reopened and altered its earlier decisions on the ground that in such other cases the Agents of both governments consented to the reopening (Brief in No. 381, p. 65). That distinction does not apply to the decision of June 3, 1936 (R. 138), and does not constitute a valid distinction in any case. The Umpire answered petitioners' argument when Germany so argued in 1933. He pointed out that additional power could be conferred upon the tribunal only by the parties which called it into being, not the Agents or their counsel, and that, therefore, if a case might be reopened by consent of the national Agents, the same action could be taken without their consent (R. 56).

We know of no case—and petitioners have cited none—where it has been held that a commission was without jurisdiction to consider a petition for rehearing properly presented to it while it was continuing to function as a judicial body. The argument that it cannot do so, even to correct fraud, is unconscionable and would both pervert justice and defeat the purpose of the Agreement of August 10, 1922.

The cases relied upon by petitioner (Brief in No. 381, p. 63) do not support the proposition for which they are cited.

Thus the *Cerruti* case (5 Moore, International Arbitrations, p. 4699) involved a submission to Grover Cleveland, as President of the United States, of a claim of Italy against

Colombia. President Cleveland's award was rendered two days before his term of office expired and the "protest" by the Colombian Government—which was *not* a petition for rehearing—was filed with the Secretary of State in the McKinley administration and was rejected.

In the *Claim of Manuel de Cala* (2 Moore, International Arbitrations, p. 1273), the application for review was made, not to the tribunal which had rendered the decision, an international commission, but to a separate domestic commission which had come into existence eight years after the international commission had ceased to function. No application was ever made to the international commission to review its own decision.

Similarly, in the *Claim of Benjamin Weil* (2 Moore, International Arbitrations, p. 1324), the application for a rehearing was denied nine months after the functions of the national commissioners had been officially declared to be at an end. The evidence in support of the application had not been before the national commissioners and had not been examined by them. Malloy, *Treaties*, Vol. I, pp. 1136-38; *Journal of 1868, Mexico Commission*, pp. 390-92.

The same commission had earlier recognized its power, while it still sat, to reopen cases by reversing its former ruling in the *Claim of Henry S. Schreck* (Sir Edward Thornton, Umpire).*

Additional instances in which commissions have reopened cases where the provisions respecting the final and binding character of the decisions were at least as strong

*This appears from the reference to this claim in the case of *Young, Smith & Co.*, 3 Moore, International Arbitrations, pp. 2184, 2186, as well as from the MSS Records of the Department of State.

as they are in the present case can readily be cited. For example, *Bouillotte's* case, French Commission of 1880 (3 Moore, International Arbitrations, pp. 2650-52, MSS Records, Dept. of State); Claim of *F. M. de Acosta y Foster*, Spanish Commission of 1871, where the decision was twice reopened, once with consent and once without consent (3 Moore, Int. Arb., pp. 2187-88, MSS Records, Dept. of State); *C. H. Campbell*, No. 94, and *A. A. Arango v. Spain*, No. 95 Spanish Commission of 1871 (MSS Records, Dept. of State). See also Ralston, *International Awards*, 15 Va. L. Rev. 1, 9 (1928).

That other commissions—like the Mixed Claims Commission—have often refused to grant rehearings in particular cases does not indicate any lack of power to grant a rehearing under appropriate circumstances.

2. The retirement of the German Commissioner did not deprive the Umpire and the American Commissioner of power to dispose of the cases.

After twelve years of litigation, the making of a record of over 100,000 pages and oral arguments consuming more than sixty days, and after it had become apparent that the Umpire and American Commissioner were finally and unalterably convinced of Germany's liability, as a final desperate effort to cheat the United States the German Commissioner walked out, protesting vigorously as he went, with the support of his Government, that he took with him all the power of the Commission to proceed (R. 145-52, 153-54, 290 *et seq.*, 195 *et seq.*, 217).

The circumstances of his withdrawal, the state of the case when he withdrew, and the correspondence revealing

his purpose are described on pages 17-23 of this brief. That he withdrew to frustrate and that his act was the act of his Government are conclusively established. No argument to the contrary is made.

The contention of the German Embassy that the withdrawal brought proceedings to a halt was plainly rejected by the Secretary of State (R. 217, quoted at page 29 of this brief).

The Commission, meeting with the two remaining members, in thorough opinions held they had power to proceed and did so (R. 59-62, 154-179).

The authorities are clear that the attempt at frustration was unavailing. *Republic of Colombia v. Cauca Company*, 190 U. S. 524 (1903); *Toledo S. S. Co. v. Zenith Transp. Co.*, 184 Fed. 391 (C. C. A. 6th, 1911); *Atchison, Topeka & Santa Fe Ry. Co. v. Brotherhood*, 26 F. (2d) 413 (C. C. A. 7th, 1928); *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N. Y. 398, 148 N. E. 562 (1925); *Grand Rapids Ry. Co. v. Jaqua*, 66 Ind. App. 113, 115 N. E. 73 (1917); *State v. Tucker*, 39 N. D. 106, 166 N. W. 820 (1918); *Burtlet v. Smith*, 94 Eng. Rep. 587 (King's Bench, 1734); *Dalling v. Matchett*, 125 Eng. Rep. 1138 (Common Pleas, 1740); Sturges, *Commercial Arbitrations and Awards* (1930), pp. 427-428, and cases there cited; Morse, *Arbitration and Award* (1872) pp. 154-58.

The domestic and international law authorities are reviewed in detail in the opinion of the American Commissioner (R. 165-179), which was adopted by the Umpire, June 15, 1939 (R. 60).

In *Matter of Bullard v. Grace Co.*, 240 N. Y. 388, 148 N. E. 559 (1925), one arbitrator in a private arbitration had withdrawn before any testimony had been taken on the

disputed phase of the case. In permitting that withdrawal to be effective, the Court of Appeals pointed out that the express provisions of the New York statute requiring *all* arbitrators to hear *all* allegations and proofs (New York Civil Practice Act §1453) changed the common law rule to the contrary.

At the same time the New York Court of Appeals, in *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N. Y. 398, 148 N. E. 562 (1925), held a withdrawal to be ineffective where the facts were comparable to the instant case. That court stated:

"If an arbitrator may resign at the last moment, in concert of action in reaching a decision as distinguished from the award itself is necessary, no award could be reached in any case if at the eleventh hour one of the three found himself in the minority and sought to serve his own interests or those of the party naming him by resigning. The law does not contemplate that the edifice thus elaborately raised should be toppled over by such an untimely explosion from within," (240 N. Y. at p. 408)

Petitioner's statements and authorities (Brief in No. 381, p. 44) with reference to the common law arbitration rule refer to the early rule that *agreements to arbitrate* disputes were not specifically enforceable. That has nothing to do with this case. As shown by the English and American cases cited *supra*, the common law denied the power of a party to an arbitration to frustrate the results of the arbitration by well-timed withdrawal of his arbitrator.

The leading case in domestic law on the effect of the withdrawal of an arbitrator under similar circumstances is *Republic of Colombia v. Cauca Company*, 190 U. S. 524 (1903).

In the *Cauca* case a controversy between the Republic of Colombia and the Cauca Company, a railway construction company, was submitted to arbitration pursuant to an agreement between the two parties. After extensive hearings, but before consideration of all points had been completed, the commissioner appointed by Colombia withdrew upon the ground that the other members of the commission had declared their intention to grant certain items of damages to the Cauca Company which he considered improper. Thereupon the commissioner appointed by the Cauca Company and the chairman completed their work and rendered a decision in favor of the Cauca Company.

Circuit Judge Goff, before whom the case was tried, characterized the action of the Colombian commissioner in language equally appropriate here. He said:

"Clearly, it was not the intention of the parties to the convention that the existence of the commission should be destroyed by a resignation of the character of that presented by Commissioner Pena. It would be an impeachment of the common honesty of the parties to the agreement, and a travesty on their evidently honorable intentions, to hold that they designed it should thus be the power of one man—actuated by, to say the least, not commendable motives—to render worthless the work resulting from the expenditure of thousands of dollars and months of careful research, in an effort to amicably adjust an unfortunate controversy, that was rapidly reaching the point of embarrassment because of its national and diplomatic character." (106 Fed. 337, at 348-349)

In the opinion of this Court, it was said that when the resignation took place "hardly anything remained to be done except sign the award" (p. 527) and

"We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission; after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee, when the discussions were closed." (p. 528)

Petitioner's statement (No. 331, p. 50) that the *Cauca* commission "adopted the rule that its decisions might be made by a majority vote" misrepresents that case. Although the *Cauca* commission did adopt such a rule, its effect was only to make unanimity unnecessary. At its next meeting it adopted the determination "that in case of disagreement between the members of the commission the chairman shall decide the question at issue," upon which basis the commission proceeded (Sup. Ct. Record, p. 98; see also 106 Fed. 337, at 344). Circuit Judge Goff recognized the effect of this. As he pointed out, the chairman was "intended to be an umpire to cast the deciding vote, and determine all matters of difference between the commissioners selected by the parties to the convention" (106 Fed. 337, at 347). By express provisions of the Executive Agreement here the Umpire had similar authority (R. 16-17).

In some of the other cases above cited holding such attempted frustration ineffective, it appears that the principal issues were under advisement when the withdrawal occurred, but in *Toledo S. S. Co. v. Zenith Transp. Co.*, 184 Fed. 391 (C. C. A. 6th, 1911), as here, the arbitrators had not considered the question of damages, but only the question of liability, when an arbitrator withdrew, and the Court held that the remaining arbitrators had power to receive

evidence on and fix the damages. In none of the cases cited (doubtless because an arbitrator is usually not withdrawn until his nominator finds he is to be out-voted) had the withdrawal occurred before questions of liability were under advisement, except the *Bullard* case, and there the court held that the withdrawal was effective because of the New York statute, which changed the common law.

This situation explains the efforts of petitioners to show that the "merits" of the sabotage cases were not under advisement when Germany withdrew. On pages 18-19 of this brief we have stated in detail the questions which were before the Commission when the retirement took place. It has been shown that in substance every question except the amount of damages was up for decision, including the question on the "merits" as to Germany's responsibility for the explosions.

The courts have never fixed any exact stage of arbitration proceedings at which a withdrawal is ineffective. The underlying principle is that it is a fraud to withdraw willfully after the parties have gone to great expense in producing evidence, and the proceedings are drawing to a close, and a real opportunity has been given the parties to present their cases.

The letter of Secretary of State Hull (page 29 of this brief) follows this line of reasoning.

In this respect this case is well within the principle of the *Cauca* case. Petitioners try to distinguish that case; on the ground that the Cauca board was a "three judge" court, while here we have two commissioners and an umpire. That distinction is without substance. The provision in the Agreement of August 10, 1922, was precisely the same in practical operation as if it had provided for three

arbitrators, one chosen by each government and the third by the two governments "with power to decide by majority vote," except that it did operate to relieve the umpire of the duty of sitting with the two commissioners throughout, if he chose.

On page 16 of this brief, we have referred to the procedure adopted for the sabotage cases, by which the three did sit *en banc* as a "three judge court" to hear arguments. The Umpire participated in all decisions, indeed wrote the opinions, whether or not the other two disagreed. The three members of the Commission sat together at the hearing which led to the decision of 1930, and later the United States questioned that procedure and Germany defended it.* In its unanimous opinion of March 30, 1931 by the then Umpire Boyden, the Commission said:

"This question is raised by the American Agent's claim that the decision was irregularly rendered because the Umpire participated in the deliberations of the National Commissioners and in the opinion

*In support of the Commission's practice of sitting and deliberating as a three-man body, the German Agent stated in 1931:

"If it [the Commission] chooses the second method the Umpire loses his character as a 'court of second instance' and becomes a qualified member of a body of three men.

"From the beginning to the present day the Commission has practically functioned as a single body with the Umpire acting as its third member, casting the deciding vote in the event of disagreement or of differences between the National Commissioners." (Memorandum Brief in Reply to Motion of the American Agent of January 12, 1931, for a Rehearing, pp. 16, 17.)

of the Commission. The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, *a practice never before questioned and not in our judgment of doubtful validity even if it had not so long been accepted by all concerned.*"* (R. 85) [Italics ours]

The provision in the Agreement of August 10, 1922, providing the method of filling vacancies, is a common one in arbitration agreements. A similar practice was provided for in the *Cauca* case (Sup. Ct. Record, p. 61). It does not by inference exclude the Commission from acting after one Commissioner has been purposely withdrawn. It is intended merely to afford each party an opportunity to fill ordinary vacancies.

John Bassett Moore, when commenting on the question of the right of withdrawal in connection with the arbitration which took place under the Jay Treaty of 1794, and commenting on the provision for filling vacancies, said:

"* * * On the other hand, it can hardly be supposed that the governments, in agreeing to Articles VI and VII, had it in mind to create a device by which either of them, or the commissioner named by either of them, might by withdrawing, readily prevent the majority of a duly constituted board from exercising its constitutional powers. *

*Petitioner in No. 382, in addition to attacking other decisions of the Commission, now also alleges that the above-quoted unanimous decision in favor of Germany of March 30, 1931 was wrong (Brief in No. 382, p. 13).

As the claim of a right to withdraw cannot reasonably be adduced from the terms of the treaty, so likewise is it unjustified under international law. Its justification in the present instances, whether at London or at Philadelphia, must, therefore, be sought in moral rather than in legal considerations."

(3 Moore, International Adjudications, Modern Series, p. 170.)

As Secretary of State Evarts stated with reference to the refusal of the Spanish arbitrator to join the American arbitrator in referring cases to the Umpire for decision in the American-Spanish Commission of 1871, it is "beyond the competence of either government to interfere with, direct or obstruct its deliberations." (3 Moore, Int. Arb., p. 2599 and MSS Notes of the United States to the Spanish Legation)

See also other international law authorities reviewed in the opinion of the American Commissioner (R. 174-76).

Petitioner's reference to action by the Mixed Arbitral Tribunals of Hungary and Roumania (Brief in No. 381, pp. 46-47) should be considered in the light of the strong opinion expressed by an eminent authority as to the ineffectiveness of the attempted frustration in that case (*Some Opinions Bearing Upon the Treaty of Trianon*, Vol. II, Fachiri, pp. 229, 239-240, 242).

There is another clear ground for holding that Germany could not frustrate the arbitration by withdrawing her Commissioner.

(i) The Knox-Porter Resolution, approved July 2, 1921 (42 Stat. 105-6) provided that all property of Germany and its nationals in the possession of the United States

should not be returned until such time as Germany had made "suitable provision" for satisfaction of claims of American nationals.

(ii) The substance of the resolution was embodied in the Treaty of Berlin of August 25, 1921 (42 Stat. 1939).

(iii) The Executive Agreement of August 10, 1922 (42 Stat. 2200) establishing the Mixed Claims Commission, was an essential part of the "suitable provision" referred to in the Treaty of Berlin.

(iv) The Settlement of War Claims Act of 1928 (45 Stat. 254), which provided for the return to Germany of seized property, *was enacted in reliance upon the fact that the Commission had been established and on assurances from Germany that she would not impede or obstruct the Commission in the disposal of these very sabotage cases.*

(v) Since its passage, in reliance on the continued functioning of the Commission, more than \$175,000,000 of German property has been returned (Final Report of the Alien Property Custodian, February 5, 1935, House Document 135, 74th Cong. 1st Sess. and Report of the Secretary of the Treasury for fiscal year ended June 30, 1939, p. 76).

The Hearings before the Senate Finance Committee, 70th Congress, H. R. 7201, January 23-26, 1928, pp. 134-9, 191-5, disclose that a representative of this same respondent Lehigh Valley Railroad Company (with remarkable foresight as events have proved) appeared and objected to the return of German property until the Mixed Claims Commission had decided the sabotage cases. He feared that, if German property was first returned, Germany would by some device disrupt the Commission and prevent the granting of sabotage awards.

The record of the Committee Hearings contains the following:

"Senator Reed. The Mixed Claims Commission does not deny that it has jurisdiction, does it?

Mr. Boles. Oh, no; it does not deny that it has jurisdiction, but the Mixed Claims Commission has not the power to force the German Government to try this case. *What will undoubtedly happen, and it is our confident belief in view of the way that we have been diplomatically maneuvered along the last three years, is that the Mixed Claims Commission will disintegrate, perhaps. There will be deaths and resignations; witnesses will die, and the thing will go on for 5 or 10 more years, and we will finally be relegated to a case before Congress.*

Senator Reed. I do not understand why you can not go ahead and prove your case, and if the German Government does not care to put in any defense, all the better for you.

Mr. Boles. The Mixed Claims Commission has no power to make an award by default. They have no power to do that. There must be a trial of the merits.

The Chairman. If that were the case, the Mixed Claims Commission never could have settled a case if the German representatives refused to talk.

Mr. Boles. That is the case.

Senator Edge. As I understand it, Mr. Boles, the difference in your case and the many cases that the Mixed Claims Commission have adjudicated and decided is that your case relates to the acts of the German Government that have never been reviewed by the Mixed Claims Commission in any case?

Mr. Boles. That is true.

Senator Edge. And that no case in which sabotage is involved has yet been tried by the Mixed Claims Commission?

Mr. Boles. *That is true; and by the very nature of these cases, they will delay them indefinitely if they can.*

Senator Edge. *And, further than that, if the German representatives will not agree to try the case, the commission is helpless?*

Mr. Boles. *Exactly so.*

* * * * *

Senator Reed. What provision do you propose that we should insert in the bill to meet this situation?

Mr. Boles. The provision that the present German property shall be retained until the Mixed Claims Commission has disposed of the cases now pending before it." (Italics ours)

Impressed by this argument, the Senate Committee called in Judge Parker, then Umpire of the Commission, and questioned him as to what the Commission could do, if Germany should decline to appear before a decision could be rendered in the sabotage claims. Judge Parker stated that the Commission could proceed to decide the cases even if Germany went so far as to refuse to appear or submit any testimony.

"Senator McLean. You have jurisdiction?

Mr. Parker. Yes; we have jurisdiction in any event. But if Germany in any case should arbitrarily decline to file an answer to the American memorial or submit testimony within the period prescribed by these rules, the commission would consider that case on its merits, not by default, but on the merits of the case made by the American agent.

Senator McLean. If they deliberately declined to appear and make any presentation, would you feel justified in rendering judgment in the case?

Mr. Parker. Unquestionably we would take the case as presented by the American Agent and decide

it according to the record made by the American agent." (*Id.*, Hearing, pp. 192, 193) (R. 83-84)

Furthermore, Judge Parker presented to the Committee a letter written to him by the Agent of the German Government, giving assurance that Germany would do nothing to impede the disposition of the sabotage claims.

"Mr. Parker. * * *

May I read this, then? It is addressed to me by Karl von Lewinski, agent of Germany:

I understand that a witness who appeared before the Senate Finance Committee to-day made the statement that he believed there was a disposition and purpose on the part of the German agent and the German Government to delay the presentation of a certain case before the Mixed Claims Commission, and that it was within the power of the German agent and the German Government to so delay the early adjudication of the case. As to the last assertion, I am confident you will agree with me that the witness in question was mistaken and that under its rules the commission may and does compel the presentation of briefs and arguments and the preparation of cases for final submission to the commission within a reasonable time. *As to the statement that there is any thought or purpose on the part of the German agent or the German Government to delay the presentation and adjudication of this or any other case, I desire to enter a most emphatic denial.*

* * * * *

I have the honor to be, sir,

Your obedient servant,

KARL VON LEWINSKI, Agent of Germany."
(Italics ours)

Satisfied by these representations, the bill was favorably reported and passed, without the Boles Amendment.*

Under those circumstances, having entered into the arbitration as a condition to the return of German property and having received benefits under the Settlement of War Claims Act, Germany could not frustrate proceedings before the Commission at any stage.*

In the *Cauca* case this Court said (p. 528):

"Colombia thus is put in the position of seeking to defeat the award after it has received the railroad in controversy and while it is undisputed that an appreciable part of the consideration awarded ought to be paid to the company under the terms of the submission.

* * *

We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, *after receiving a large amount of property under it*, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed." (Italics ours)

Finally, if there were any doubt as to the failure of Germany's attempted frustration, this Court's accepted principle of treaty construction would resolve it. As Mr. Justice Stone has stated:

"In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted con-

*With the above indication of Congressional intent in enacting the Settlement of War Claims Act of 1928, compare the unwarranted statement in petitioner's brief (No. 381, p. 73) that "Congress never intended to appropriate funds to the payment of any alleged awards under the circumstances here disclosed."

struction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." (*Factor v. Laubenheimer*, 290 U. S. 276, at 293-94 (1933))

See also *Asakura v. Seattle*, 265 U. S. 332, 342 (1924); *Geofroy v. Riggs*, 133 U. S. 258, 271-72 (1890); and 30 Col. L. Rev. 521, at 523 *et seq.* (1930).

By the Executive Agreement of August 10, 1922 Germany "resolved to submit" and did submit all "questions for decision" to the Mixed Claims Commission. That submission was "final and binding" and could not be withdrawn at will. Until such questions were finally decided, Germany possessed no power to veto, or by any device to withdraw from the consideration of the Commission, permanently or indefinitely, any questions involved in the determination of the American claims.

3. Agency of Canadian Car & Foundry Company is an American national within the meaning of the Executive Agreement of August 10, 1922.

That concern is a New York corporation. Its offices always have been in New York City. Practically all its

business was done in the United States. Its plant, which was destroyed, was located at Kingsland, New Jersey, where it employed two thousand men (R. 185). The petitioners assail the award to the United States on behalf of that claimant as void and beyond the power of the Commission on the theory that the corporation was not an American national within the meaning of the agreement establishing the Commission. All of the stock of the New York corporation was owned by a Canadian corporation, and a portion of the Canadian corporation's stock was held by citizens of the United States, the number of shares varying from time to time between 30% and 45% (R. 185-86).

The question whether its losses were the proper subject of an award involved questions of fact and also interpretation of the Executive Agreement and came before the Commission for decision in the regular course of its duties. In every claim the Commission was required to determine the nationality of the claimant.

The argument that the Commission did not have power to decide questions of fact and law respecting nationality by decisions "binding on the two governments" would result in leaving the question of nationality to be settled in every case by separate diplomatic agreement.

The full facts affecting nationality were disclosed to the State Department and to Germany many years ago (R. 185-86). The State Department espoused the claim (R. 186). Not until December 7, 1936, nine years after the United States had filed the claim with the Commission, and after thousands of pages of evidence had been taken respecting its merits, did Germany, in a half-hearted way, raise the question of nationality (R. 183). On December 7, 1936 (after the first argument on the fraud petition for

rehearing), Germany filed a motion raising the point; on March 18, 1937, the German Agent withdrew his motion; on April 27, 1937, he renewed it (R. 183). After both Agents had filed briefs on the point, the Commission denied the motion (R. 195).*

The propriety of the award is so amply supported by the authorities cited and discussed in the opinion of the American Commissioner of October 30, 1939 (R. 182-94), which was concurred in by the Umpire (R. 195), that no useful purpose would be served by reviewing those authorities here, or discussing the provisions of the Agreement of August 10, 1922 as to the character of the claims to be considered.

Petitioners' brief merely recites the same cases cited before the Commission and discarded by the Umpire and the American Commissioner as inapplicable to the situation presented by the claim.

III.

MISCELLANEOUS CONTENTIONS OF PETITIONERS

1. Certificate of disagreement

The petitioners stress the fact that no written certificate of disagreement between the National Commissioners preceded the decisions of June 15 and October 30, 1939.

*Although petitioner in No. 382 does not argue the nationality question, it is interesting to note that counsel for that petitioner, in his Report of May 15, 1937, as Commissioner in the settlement of the American-Turkish claims under the Agreement of December 24, 1923, stated

"The nationality of a corporation is that of the state under whose laws the corporation is organized."
(American-Turkish Claims Settlement, Opinions and Report, p. 119)

The Agreement of August 10, 1922, did not require such certificates. They were provided for by a rule of the Commission as a convenient and formal procedure. Years ago the Commission held they were unnecessary in cases where the Umpire sat with the Commissioners and became aware of a difference of opinion (R. 51-52).

The petitioners also contend there was no disagreement in fact before the German Commissioner resigned. The Umpire and American Commissioner stated of record there was (R. 59-60, 159). The letter of the German Commissioner complaining of the Umpire (R. 145-47) states that he retired because the Umpire was so fixed in his opinions that he would not listen to the German's arguments, a naive confession that the German Commissioner had and urged fixed opinions of his own.

In passing it may be noted that, if any member of the Commission had no convictions after days of argument, reams of briefs and days of conferences, he would have been an extraordinarily weak person.

This is all immaterial. The essential point is that, if the German Commissioner's absence and consequent non-participation in decisions could not frustrate the proceedings, the mere formal consequences of his absence, rendering him unavailable to "disagree" or sign certificates, could not frustrate. The greater includes the less.

2. Complaints of unfairness and lack of notice in fixing damages

That subject is fully covered in the statements of facts, pages 17-32 of this brief, on which we rest.

3. Complaints against the Commission because of the finding made June 15, 1939, on the "merits" which it is claimed were not under submission

Here also the statement of facts, pages 17-27 of this brief, is sufficient answer.

4. The claim that there were genuine issues as to material questions of fact, which made it improper to grant summary judgment

The ⁴short answer to this is that petitioner, Z. & F. Assets Realization Corporation, which now argues the point in its brief, did not mention it or make it the subject of an assignment of error in its petition for *certiorari*, and counsel for the other petitioner, although he mentioned the point in his petition for *certiorari*, did not include it in his assignments of error in his supporting brief on petition for *certiorari* and does not urge the point in his brief here, by assignment of error or otherwise.

The statement by petitioner in No. 381 of alleged genuine issues of fact (pp. 80-82 of its brief) shows how flimsy the point is.

Rule 56(c) of the Federal Rules of Civil Procedure provides that, on motion for summary judgment, the judgment sought "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The alleged issues of fact claimed by petitioner to require denial of the motion are stated to be (Brief in 381, pp. 80-82):

"First: If the time of the issuance of the certificate is at all relevant, there is an issue of fact as to whether the Certificates of the Secretary of State certifying to the awards were transmitted to the Secretary of the Treasury, with knowledge that this action had been commenced.

* * * * *

"Second: Whether the Commission, with Germany's consent, had under consideration the merits of the sabotage claims.

* * * * *

"Third: There is at least an issue of fact whether there was a disagreement between the two national Commissioners authorizing the Umpire to function."

Its first "issue", whether or not the Secretary of State certified the awards with knowledge that the complaint in the District Court had been filed, is of no consequence and could only become so if the Court should decide that the question of validity of the awards is justiciable and that the awards are invalid, and the question then arose whether it was too late to grant relief. All the reasons we advance to the effect that the Courts have no power to interfere with foreign relations and that the awards are valid would apply as well, if the certificates had not yet been made.

Their second "issue", that there is an issue of fact as to whether the Commission had under consideration the

"merits", is irrelevant if the Court sustains our position that it cannot inquire into the validity of the awards.

If it does inquire into their validity, the question of what was up for decision when Germany withdrew is not material *unless* the Court should hold that the withdrawal prevented the Commission from deciding *any* further question. In addition, the proof of what was before the Commission is contained in the records of the Commission, including the official opinions of the Umpire and American Commissioner,—unless, perhaps, the petitioners hope to impeach them by the testimony of the Ex-German Commissioner. In respect of that, Rule 56(e) requires that affidavits on motions for summary judgment must be "on personal knowledge", and the petitioners present no affidavit from any one assuming to have personal knowledge.

As to the third "issue", *viz.*, whether there was a disagreement in fact between the Commissioners, the situation is precisely the same.

Under the circumstances, a trial would serve no purpose other than to delay a determination of the questions presented. *Eastern States Petroleum Co., Inc. v. Asiatic Petroleum Corporation, et al.*, 28 F. Supp. 279 (S. D. N. Y., 1939); *Banco de Espana v. Federal Reserve Bank of New York*, 28 F. Supp. 958 (S. D. N. Y., 1939), *aff'd* 114 F. (2d) 438 (C. C. A. 2d, 1940). The following comment of the Court in the *Banco de Espana* case is apt (p. 975):

"It appears to me that these cases should be disposed of on these motions and not at a trial. No genuine issues of any material facts are presented. The entire transaction is before the Court, evidenced mainly by duly authenticated or undisputed documents. The Rule for summary judgment was intended for just such a situation."

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

WILLIAM D. MITCHELL,

*Attorney for Respondent,
Lehigh Valley Railroad Company*

CARL A. DE GERSDORFF,

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 381 and 382

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; **AMERICAN-HAWAIIAN STEAMSHIP CORPORATION**, Intervener,

Appellants.

v.

CORDELL HULL, Secretary of State and **HENRY MORGENTHAU**, Secretary of the Treasury; **LEHIGH VALLEY RAILROAD COMPANY**, Intervener,

Respondents

**MOTION OF LEHIGH VALLEY RAILROAD COMPANY,
RESPONDENT, TO ADVANCE**

WILLIAM D. MITCHELL,
*Attorney for Respondent, Lehigh
Valley Railroad Company*

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Respondents

MOTION OF LEHIGH VALLEY RAILROAD COMPANY, RESPONDENT, TO ADVANCE

The Lehigh Valley Railroad Company moves that this case be advanced for early hearing.

Statement

As this case has recently been considered by the Court on petitions for certiorari, an extended statement is unnecessary.

The Court will remember that in October, 1939, the Mixed Claims Commission, United States and Germany, made awards in the sabotage cases, against Germany and in favor of the United States, on behalf of 153 persons and corporations, of which the Lehigh Valley Railroad Company is one, in the aggregate

principal sum of about \$21,000,000. These awards were certified by the Secretary of State to the Secretary of the Treasury for payment.

The petitioners, holders of earlier awards, brought this action to restrain the Treasury from paying the awards, on the ground that they are invalid, and if paid would deplete the fund available to pay petitioners and others of their class. The Lehigh Valley Railroad Company intervened on behalf of the sabotage claimants and moved for summary judgment dismissing the complaint. ^{The summary judgment} The Secretary of the Treasury also moved to dismiss the complaint. The District Court granted the motions. The Court of Appeals affirmed.

Reasons Supporting the Motion

1. The delay in payment of the sabotage awards is costing the sabotage claimants approximately \$3,000 per day in interest, or loss of the use of the money.

This is an irreparable loss.

The principal of the sabotage claims is \$21,000,000. The interest to date brings the total to about \$50,000,000. Only about \$24,000,000 is now available for their payment. Unless Germany pays in more, there never will be enough to pay the interest. Germany has long since defaulted in payment. If she loses the war she cannot pay, and if she wins no one believes she will pay.

The Treasury has refrained from paying, merely because of the pendency of this case, and the petitioners have never even applied for a temporary injunction. They are really enjoying the benefits of a temporary injunction without bond.

Aside from the irreparable loss in interest (or in

use of the money, whichever way one looks at it), many of the 153 sabotage claimants are either suffering, or at least greatly inconvenienced through delay in prompt payment of their claims, which they had reason to count on after the awards were rendered.

We cannot properly burden the Court with the special problems of each of them. As an example, the Lehigh Valley Railroad itself has recently been reorganized. Although the millions it will receive on its sabotage claims were not a necessary factor in the reorganization plan, the probability of payment was given consideration, and payment of such sum would doubtless ease the problems of any reorganized railroad. The Railroad also owes the Reconstruction Finance Corporation \$1,574,000, which it has promised to pay out of its sabotage award.

2. To advance this case should not be unfair to litigants in other pending cases. There must be few cases, if any, pending in this Court, in which irreparable damage is being suffered, as in this case, through every day's delay in final disposition.

3. From the standpoint of the public interest, it should be noted that the pendency of this action is delaying the final adjustment of the German Special Deposit Account, and the Alien Property Accounts, by the Treasury Department and the Department of Justice, and is also delaying the winding up of the affairs of the Mixed Claims Commission.

4. The case brought into operation the summary judgment procedure introduced into the Federal system by the new rules of civil procedure, and intended to expedite the disposition of cases having no merit as a matter of law.

We do not claim that merely because a case was so disposed of below it has precedence here, but at least this Court may take it into account.

5. The petitioners will not be prejudiced by advancing the case. The record is short, and the case thoroughly briefed below.

Normally we should assume that if the petitioners expect to succeed they would desire an early hearing, but they have never taken any step to expedite the case. The judgment of the Court of Appeals was rendered June 3, 1940. The petitions for certiorari were not filed until August 29th, two months and twenty-six days later. If the petitions had been filed with what we think would have been reasonable promptness, this case would have been near the head, instead of near the foot of the calendar at this term.

Respectfully submitted,

WILLIAM D. MITCHELL,
*Attorney for Respondent, Lehigh
Valley Railroad Company.*

SUPREME COURT OF THE UNITED STATES.

Nos. 381, 382.—OCTOBER TERM, 1940.

Z. & F. Assets Realization Corporation,
Petitioner,

381

vs.

Cordell Hull, Secretary of State, and
Henry Morgenthau, Secretary of the
Treasury; Lehigh Valley Railroad
Company, Intervener.

On Writs of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia.

American-Hawaiian Steamship Com-
pany, Petitioner,

382

vs.

Cordell Hull, Secretary of State, and
Henry Morgenthau, Secretary of the
Treasury; Lehigh Valley Railroad
Company, Intervener.

[January 6, 1941.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Petitioners, Z. & F. Assets Realization Corporation and American-Hawaiian Steamship Company, are holders of awards of the Mixed Claims Commission, United States and Germany. These awards have been certified by the Secretary of State and are thus payable out of the fund established by the Settlement of War Claims Act of 1928.¹ Petitioners seek a judgment declaring that later awards purporting to be made by the Mixed Claims Commission in favor of the Lehigh Valley Railroad Company, the Agency of Canadian Car and Foundry Company, Limited, the Bethlehem Steel Company and others, are null and void, and restraining the certification of these awards by the Secretary of State and their payment by the Secretary of the Treasury. The Lehigh Valley Railroad Company intervened as a defendant.

Defendants, the Secretary of State and the Secretary of the Treasury, moved to dismiss petitioners' bills for want of jurisdiction and for failure to state a claim upon which relief could be granted. The intervenor defendant filed an answer and moved for summary judgment. The District Court dismissed the bills (31 F. Supp. 371) and its judgment was affirmed by the Court of Appeals. 114 F. (2d) 464. We granted certiorari. October 14, 1940.

The Mixed Claims Commission, United States and Germany, was set up pursuant to an agreement of August 10, 1922,² to determine the amount to be paid by Germany in satisfaction of her financial obligations under the Treaty of Berlin of August 25, 1921.³ The Commission consisted of three members, one appointed by the United States, another by Germany, and an Umpire selected by the two Governments. The Umpire was "to decide upon any cases concerning which the Commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings". It was further provided that should the Umpire or any of the Commissioners die or retire, or be unable for any reason to discharge his functions, the vacancy should be filled in the same manner as the original appointment. It was agreed that the decisions of the Commission and those of the Umpire should be accepted as final and binding upon the two Governments.

The Settlement of War Claims Act of 1928 created in the Treasury a "German Special Deposit Account". Section 2 provided that the Secretary of State should certify from time to time to the Secretary of the Treasury the awards of the Mixed Claims Commission, and the Secretary of the Treasury was directed to pay out of the amounts placed in the account the principal of each award so certified, with interest as stated.

The claims covered by the awards attacked by petitioners arose out of the destruction of property caused by explosions at Black Tom and Kingsland, New Jersey, in 1916 and 1917. These claims were dismissed by the Commission in 1930, and petitions for rehearing were denied in 1931 and 1932. In the following year the American agent sought to reopen the cases upon the ground that in its decision of 1930 the Commission had been misled by "fraudulent, incomplete, collusive and false evidence" on the

² 42 Stat. 2200.

³ 42 Stat. 1939.

part of witnesses for Germany. The German Government denied the power of the Commission to reopen and the Umpire, Mr. Justice Roberts, finding that there was a disagreement upon the question between the Commissioners, decided, in December, 1933, that the Commission was competent to determine its own jurisdiction by the interpretation of the Agreement creating it. The Umpire further decided that, while the Commission was without power to reopen a case merely for the presentation of after discovered evidence, the Commission was still sitting as a court and did have power to consider the charge that it had been misled by fraud and collusion, and for that purpose to reopen the cases in order that it might consider the further evidence tendered by the American agent, and that offered in reply on behalf of Germany, and either confirm the decisions theretofore made or alter them as justice and right might demand.

Thereafter, the German agent filed an answer denying the allegations of fraud and evidence was presented. After argument, the Commission, in June, 1936, rendered a decision, the German Commissioner concurring, by which the ruling of 1932 denying a rehearing was set aside, and the question whether there should be a rehearing was reserved for a hearing which should be separate and distinct from an argument on the merits unless Germany should consent to a different course.

Efforts to obtain a settlement of the claims were unsuccessful and, after much additional evidence had been introduced, the Commission, in January, 1939, heard extended arguments by the agents of the respective Governments. The American agent had requested that the Commission should not only set aside the original decision of 1930 but should also proceed to a final decision on the merits, as it was contended that the evidence presented to support the application for rehearing also established the responsibility of Germany for the destruction of the property as claimed. It also appears that the German Commissioner insisted that, before the motion for rehearing should be granted, the Commission should examine the proofs tendered by the United States to determine whether the claims had been made good. This, as stated by the Umpire, was upon the ground that even though the Commission had been misled by false and fraudulent testimony, that would be immaterial if, upon an independent consideration,

the United States in its own cases had failed to sustain its burden of proof. The American Commissioner and the Umpire thereupon had agreed to go beyond what they thought the necessary function of the Commission in the circumstances and had proceeded to canvass with the German Commissioner the cases as made by the United States.

During the course of that investigation, on March 1, 1939, the German Commissioner withdrew from the Commission. At the time of his withdrawal, the two Commissioners, according to the contention of the American Commissioner and as found by the Umpire, were in disagreement upon the points in issue. On receiving notice of a meeting of the Commission to be held on June 15, 1939, the German agent said that he would not appear and the German Embassy advised the Secretary of State that, since the withdrawal of the German Commissioner, the Commission was incompetent to make decisions.

At the meeting held pursuant to the notice, the American Commissioner filed a certificate of disagreement with an opinion sustaining the jurisdiction of the Commission. The Umpire thereupon decided that there did exist a disagreement between the two Commissioners,—a disagreement of which he was personally cognizant and which was also shown by the certificate and opinion of the American Commissioner; that the jurisdiction of the Commission was not ousted by the withdrawal of the German Commissioner "after submission by the parties, and after the tribunal, having taken the cases under advisement, pursuant to its rules, was engaged in the task of deciding the issues presented"; that the United States "had proved its allegation that fraud in the evidence presented by Germany misled the Commission and affected its decision in favor of Germany"; and that upon the record as it then stood the cases for the claims were made out.

Thereupon, the American agent moved for awards in favor of the United States on behalf of the sabotage claimants. An order was entered setting aside the decision of 1930, and determining that the liability of Germany had been established and that, as it appeared that Germany did not intend to take part in further proceedings of the Commission, awards should be made upon the Commission's findings and opinion.

On October 3, 1939, the German Chargé d'Affaires addressed an elaborate communication to the Secretary of State making a detailed statement supplementary to a note of July 11, 1939, with respect to the alleged illegal acts of the Umpire, and protesting against all further measures by the Umpire, the American Commissioner and the American agent, which were aimed at securing awards in the Black Tom and Kingsland cases. The Secretary of State replied, on October 18, 1939, that it would be highly inappropriate for the Department to endeavor to determine the course of the proceedings of the Commission; that the Secretary had entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite the severe and, as he believed, "entirely unwarranted criticisms", and that he was constrained to invite attention to the fact "that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion".

Notice was given of a meeting of the Commission to be held on October 30, 1939, which the German Commissioner did not attend, and awards were then made in favor of the claimants. The Umpire stated that he had found the awards to be accurately and properly calculated and had joined the American Commissioner in signing them.

The awards were certified by the Secretary of State to the Secretary of the Treasury on October 31, 1939, pursuant to the Settlement of War Claims Act of 1928. On the same day, this suit was brought, the complaint being filed before, and process being served on the Secretary of State after, his certification of the awards.

The Court of Appeals has held that the question with respect to the validity of the awards in favor of the sabotage claimants is political in its nature and that the District Court was without jurisdiction to entertain it.

There are, however, certain preliminary questions which are indubitably appropriate for judicial consideration, and we think that the proper answer to these questions is determinative of the whole case.

The first question is whether petitioners have standing to bring this suit. Except for the situation created by the Settlement of War Claims Act of 1928, they would have no such standing. They could not be heard to complain of action upon claims other than their own. And Congress, with or without awards, could provide for the payment of the claims in question without let or hindrance by petitioners. But petitioners contend that the Settlement of War Claims Act created a fund in the Treasury, known as the "German Special Deposit Account"; that petitioners with other earlier award-holders are entitled by the Act to payment out of that fund; that the fund is insufficient to pay petitioners' claims in full if payments are permitted to be made to the sabotage claimants; and hence that petitioners have standing to complain of an unlawful depletion of the fund to their injury by means of such payments.

We think that in these circumstances as shown by the bills petitioners are entitled to sue to protect such interests as they may have under the Act. Compare *Houston v. Ormes*, 252 U. S. 469; *Mellon v. Orinoco Iron Co.*, 266 U. S. 121. But as their standing rests solely upon the provisions of the Act, they may not escape its terms or succeed in a challenge to payments for which the Act is found to provide.

The next question is with respect to the effect that should be given under the terms of the statute to the action of the Secretary of State in certifying the awards. Congress has authorized and required the Secretary of the Treasury to pay out of the special account the awards which the Secretary of State has certified. There is no question that the Secretary of State has given his certificate in this instance. It is adequate in form and substance under the terms of the Act.

Petitioners contend that the certification is a mere ministerial act. It is said to mean merely that the award is a genuine document, in the same sense that a notary public authenticates the signature of a grantor in a deed. We think that this construction of the Act is inadmissible. The notarial conception of the function of the Secretary of State in this matter ignores his rôle in the conduct of foreign affairs as the right hand of the Executive and in particular his relation to proceedings for the determination of claims of the United States against foreign governments. There can be no doubt of the constitutional authority of Congress to lodge with the Secre-

tary of State the authority to consider and pass upon the regularity and validity of the awards made by the Mixed Claims Commission for the statutory purpose of qualifying them for payment out of the account in the Treasury. Congress had complete power to decide what payments should be made from that account and to attach such conditions as it saw fit. Congress not only had this power but it was natural and appropriate that Congress should entrust to the Secretary of State the decision of questions that might arise with respect to the propriety of the payment of awards made by the Commission and to require his affirmative action through certification before payment. The Mixed Claims Commission had been created by an executive agreement. The claims to be considered by the Commission were only those sponsored and presented by the United States against Germany. They were presented as claims of the United States, the national claimants themselves having no standing save as they were represented by the United States. See *Frelinghuysen v. Key*, 110 U. S. 63, 75, 76; *Boynton v. Blaine*, 139 U. S. 306, 323, 325; *Williams v. Heard*, 140 U. S. 529, 537, 538. The claims so sponsored were presented and handled by an American agent appointed by the Secretary of State. It was obvious, as the present contentions abundantly illustrate, that the proceedings before such a commission might easily give rise to questions between the governments concerned and might involve diplomatic representations or protests with which it would be the duty of the Secretary of State to deal. Whatever might be said of such representations or protests, or the occasion for them, or with respect to the existence of any international right or obligation arising from the agreement setting up the Commission, Congress could, and naturally would, require the views of the Secretary of State before appropriating money for the payment of awards, and, in creating a special fund for that purpose, would look to the Secretary of State for the exercise of his appropriate authority on behalf of the Executive and thus for his judgment upon the question whether the proceedings had been such as duly to qualify the awards for payment. See *Frelinghuysen v. Key*, *supra*; *Boynton v. Blaine*, *supra*. We find nothing in the Settlement of War Claims Act which points to a different purpose.

It is suggested that the Secretary of State construed his action in certifying as merely ministerial because he acted at once on the

President

presentation of the awards. But the argument overlooks the fact that the Secretary of State had long been cognizant of the questions that had arisen in relation to the Commission's authority to grant a rehearing and make the awards. As early as October, 1933, the German Government had notified the Secretary of State that it regarded the Commission as without authority to grant a rehearing on the sabotage claims. The Secretary of State had informed the American agent that the question of jurisdiction was one properly to be decided by the Commission itself and he directed the American agent to bring the matter to the attention of the American Commissioner, or the full Commission, for the purpose of obtaining the decision of the Umpire on that disputed point. In March, 1939, the American Commissioner informed the Secretary of State of the withdrawal of the German Commissioner and reviewed the circumstances. In June, 1939, petitioners themselves formally communicated to the Secretary of State their objections to the proceedings. In the same month the German Embassy advised the Secretary of State that its Government regarded the Commission as incompetent to make decisions because of the German Commissioner's withdrawal. This was followed by a further protest delivered to the Secretary of State in July and a detailed statement by the German Government of its grounds in its communication of October 3, 1939, to which the Secretary of State replied on October 18, 1939, in the note from which we have quoted. Thus, when the actual awards were presented the Secretary of State had before him these diplomatic representations and was fully conversant with all the proceedings of the Commission, with the action of the German Commissioner and the attitude of his Government, and with the contentions of petitioners. We find no basis for concluding that the Secretary of State in certifying the awards did not act after due deliberation or fail to express his considerate judgment, as we think the statute contemplated.

We are of the opinion that for the purpose of payment under the statute the certificate of the Secretary of State must be deemed to be conclusive. We do not need to consider whether Congress could commit to the judiciary the determination of the validity of the challenged claims (See *La Abra Silver Mining Co. v. United States*, 175 U. S. 423), for Congress has not done so but has made payment out of the fund depend upon the Secretary's certificate. The ques-

tion in this relation is simply one of the intent of Congress as disclosed by the Act. Congress has expressly directed payments to be made from the special account of the awards "so certified". The literal and natural import of this provision is that finality is to be accorded to the certificate of the Secretary of State and we perceive no ground for limiting the terms of the Act by construction. On the contrary, the nature of the questions presented and their relation to the conduct of foreign affairs within the province of the Secretary of State support the conclusion that the statute should have effect according to its explicit terms.

In view of the statutory provisions governing this case, we have no occasion to consider the circumstances in which an international agreement, or action thereunder, may be deemed to vest rights in private persons, or the scope of such rights in particular cases. See *Comegys v. Vasse*, 1 Pet. 193; *Mellon v. Orinoco Iron Co.*, *supra*. Petitioners must claim solely by virtue of their interest in the fund created by the statute and under its terms they are not entitled to complain of payments out of that fund of awards which the Secretary of State has certified.

The judgment of the Court of Appeals is affirmed.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.



Test:

Clerk, Supreme Court, U. S.

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SUPREME COURT OF THE UNITED STATES.

Nos. 381, 382.—OCTOBER TERM, 1940.

Z. & F. Assets Realization Corporation,
Petitioner,

381

vs.

Cordell Hull, Secretary of State, and
Henry Morgenthau, Secretary of the
Treasury; Lehigh Valley Railroad
Company, Intervener.

American-Hawaiian Steamship Com-
pany, Petitioner,

382

vs.

Cordell Hull, Secretary of State, and
Henry Morgenthau, Secretary of the
Treasury; Lehigh Valley Railroad
Company, Intervener.

On Writs of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia.

[January 6, 1941.]

Mr. Justice BLACK, concurring.

Mr. Justice Douglas and I concur in the judgment of affirmance but on the ground that the petitioners set up no justiciable controversy which the court had power to determine. The questions raised by the petitions involve relations between the United States and Germany, which we believe are constitutionally committed exclusively to the legislative and executive departments.

The sole ground upon which petitioners prayed relief in the District Court was that awards made by the Mixed Claims Commission were "wholly null and void and without jurisdiction on the part of the alleged Commission." A declaratory judgment was sought to have the awards declared null and void, and to enjoin the Secretary of State from certifying and the Secretary of the Treasury from paying such awards made by the Commission. In addition petitioners asked a mandatory injunction to require the Secretary

of the Treasury to pay petitioners without regard to other awards of the Commission certified by the Secretary of State.

The Secretary of State and the Secretary of the Treasury moved to dismiss on the grounds, among others, that the complaint stated no cause of action; the court had no jurisdiction to review the action of the Mixed Claims Commission; the court was without power to pass upon the jurisdiction of the Mixed Claims Commission; and the court had no jurisdiction to restrain the Secretary of State from certifying awards of the Commission or to enjoin the Secretary of the Treasury from paying the claims so certified. The District Court dismissed and the Circuit Court of Appeals affirmed on the ground that the actions of the Mixed Claims Commission in making awards and the Secretary of State in certifying them were committed for determination to the political department of government and therefore the courts were without power to review their determination. We agree with their conclusion. And in this view we believe the certifications of the Secretary of State must be deemed final and conclusive in the courts, not because the conduct of the Secretary and the Commission preceding certification meets approval of the courts, but because power to make final determination rests with the political departments of government alone.

The fundamental questions raised by the petitions as presented to the District Court, were: Who can challenge the propriety of the Commission's awards? Does the judicial branch of government, rather than the political, possess the power finally to determine the propriety of the awards? And the fact that petitioners sought to challenge the Commission's power by proceedings against the Secretaries of State and the Treasury, and not by direct suit against the Commission, is immaterial. If petitioners cannot directly attack the Commission in the courts, neither can they, in the absence of Congressional consent, assail the propriety of its awards through the expedient of suits against others charged with responsibility for executing the final determination of the Commission.

The Mixed Claims Commission was set up pursuant to an agreement between the United States and Germany. The agreement gave the Commission full power to hold hearings to determine "the amount to be paid by Germany in satisfaction of Germany's financial obligations" under two treaties previously made between the

two countries. The agreement further provided that "the decisions of the Commission and those of the Umpire (in case there may be any) shall be accepted as final and binding upon the two governments." The Commission was set up with an Umpire and all of the awards were reported to the Secretary of State by the Commission.

While petitioners contend that they have the right to challenge the certification of the Secretary of State, it is to be remembered that their petitions ultimately rest solely upon the premise that it is his duty to refuse to carry out the Commission's awards because of alleged impropriety of the proceedings of the Commission. They say that the Commission was without jurisdiction and power to make awards to certain claimants other than themselves; payment of these awards out of a fund that is limited in amount will result in diminishing payments to them below the full amount of their award with interest; since the Commission was without power—as they charge—to make these other awards, the Secretary of State should not have certified them for payment; and for the same reason the Treasury should not pay them. They assert a right through court procedure to challenge payment to the other claimants by reason of an Act of Congress of 1928.¹

But the 1928 Act provides that the Secretary shall from time to time certify to the Secretary of the Treasury the awards of the Mixed Claims Commission of the United States, and that the Secretary of the Treasury is authorized and directed to pay "the principal of each award so certified, plus the interest thereon in accordance with the award," Nowhere in the Act is there any language which either expressly or by fair implication indicates a purpose of Congress to permit some claimants to resort to the courts—as petitioners here have done—to determine the propriety of awards by the Mixed Claims Commission to other claimants.

The exact challenge made by petitioners against the awards of the Commission is the subject of a diplomatic controversy between the United States and Germany. Germany's contention is the same as petitioners'. And the Secretary of State, in charge of our foreign affairs, has declined to accede to Germany's contention that the particular awards here in controversy were improper and should not be certified or paid. The immediate subject matter of

¹ 45 Stat. 254.

petitioners' complaint, upon which rests the power of the Court to act, if it has any power, has therefore been repudiated by the political branch of our government. A contrary conclusion by the courts would bring about a square clash between the executive and judicial branches of government. And far more than this. Whoever is entrusted finally to determine what government must or must not do in a dispute between nations is the ultimate arbiter of momentous questions of public policies affecting this nation's relations with the other countries of the world.

The controversy here bears all the earmarks of that type of controversies which our Constitution has confided exclusively to the executive or political departments of government, and concerning which this Court has many times repeated "that the action of the political branches of the government in a matter that belongs to them, is conclusive."² Since this clearly appeared from the face of the pleadings at the very outset, the District Court properly stayed its hands and renounced power to proceed.

² *Williams v. Suffolk Insurance Co.*, 13 Pet. 415, 420; *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 320, 321, 322-6; *Frelinghuysen v. Key*, 110 U. S. 63. No good purpose would be served by setting out the numerous decisions of this Court to the same effect. For a collection of such cases see *Digest of the U. S. Supreme Court Reports*, vol. 4, Courts, Secs. 49-63.